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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal from the United States District Court for the Middle District of Florida, Jacksonville Division

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JURISDICTIONAL STATEMENT

Florida East Coast Railway Company (East Coast) appeals from the judgment of the United States District Court for the Middle District of Florida, Jacksonville Division, entered June 8, 1966, dismissing its complaint to set aside orders of the Interstate Commerce Commission (Commission) authorizing merger of the Atlantic Coast Line Railroad Company (Coast Line) and Seaboard Air Line Railroad Company (Sea-

board). East Coast submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

This is the second time this merger has been before this Court. The district court initially held the order of the Commission authorizing the merger invalid. *Florida East Coast Railway Company* v. *United States,* 242 F. Supp. 14. On appeal, this Court vacated the judgment and remanded the case for a full review of the administrative order by the district court. *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154. On remand, with one judge concurring in the result only, the district court sustained the order of the Commission and entered judgment dismissing the complaint. This appeal is from that judgment.

The opinion and judgment of the district court from which this appeal is taken are not reported and are printed as Appendix A to this statement. The opinion of this Court vacating the initial decision of the district court is reported at 382 U.S. 154 and is printed as Appendix B to this statement. The initial decision of the district court holding the order of the Commission invalid is reported at 242 F. Supp. 14 and is printed as Appendix C to this statement. The report of the Interstate Commerce Commission authorizing the merger is printed at 320 I.C.C. 122 and copies of the printed report have been supplied by East Coast for the use of the Court. The orders of the Commission dated December 2, 1963, and March 4, 1964, authorizing the merger, are printed as Appendices E and F, respectively, to this statement.

JURISDICTION

The action was brought under 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325 and 49 U.S.C. § 17(9) to set aside orders of the Commission entered under § 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2). The judgment of the district court was entered June 8, 1966. Notice of appeal was filed August 8, 1966. The Supreme Court has jurisdiction of this appeal under 28 U.S.C. §§ 1253 and 2101(b). *McLean Trucking Co.* v. *United States,* 321 U.S. 67; *Minneapolis & St. L. R. Co.* v. *United States,* 361 U.S. 173.

QUESTIONS PRESENTED[1]

1. Whether the Commission, in concluding that cost savings in the estimated amount of 20 million dollars obtained by eliminating the present competition between Seaboard and Coast Line constituted a public benefit that outweighed the anticompetitive consequences of the merger, properly accommodated the standards of the Interstate Commerce Act with the National Transportation Policy and the policy of the antitrust laws.

2. Whether the Commission estimated the scope and appraised the effects of the curtailment of competition which will result from the merger of the Seaboard and Coast Line as required by *McLean Trucking Co.* v. *United States,* 321 U.S. 67, when the Commission adopted the policy that the maintenance of railroad competition is irrelevant to the public interest because of the presence of competition from other forms of transport.

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[1] All points raised in the Notice of Appeal are also presented. The Questions Presented stated above sets forth the major issues.

STATUTES INVOLVED

Sections 5(2)(b), 5(2)(c), 5(2)(d), and 5 (11) of the Interstate Commerce Act, 49 U.S.C. §§ 5(2)(b), 5(2)(c), 5(2)(d), and 5(11); the National Transportation Policy, 49 U.S.C. preceding § 1; and Sections 7 and 11 of the Clayton Act, 15 U.S.C. § 18 and 21 are printed in Appendix D.

STATEMENT

The merger of the Coast Line and Seaboard will significantly reduce railroad competition in the Southeast and will produce a railroad monopoly in central and western Florida. Coast Line and Seaboard now operate parallel, competing, lines of railroad. The principal rail competition experienced by each of the merging roads is provided by its merger partner. Approximately one-third of their traffic producing revenues of 130 million dollars annually is now directly competitive. After the merger, more than half of the carload freight revenues of the merged company will be derived from freight shipped between points at which the merged company will have a railroad monopoly at origin, at destination, or both. The merged company will be the only railroad available to shippers, who, in 1957, shipped over 25 billion pounds of freight (320 I.C.C. at 163, 164, 217).

Coast Line and Seaboard are prosperous railroads. Net annual income for the periods 1955 to 1962 averaged 16.4 million for Seaboard and 11.3 million for Coast Line. Traffic and revenues are increasing. Between the period 1959 to 1962, total operating revenues of Coast Line increased by 6.1 percent and revenue ton miles by 11.9 percent. For the corresponding

period, Seaboard enjoyed an operating revenue increase of 2.2 percent and an increase in ton miles of 6.2 percent. Increases in the volume and revenues of the principal commodities transported by Coast Line and Seaboard are even more impressive. Approximately 75 percent of the carload tonnage and 45 percent of the carload freight revenues of the two companies are derived from the transportation of nine groups of bulk commodities.[2] During the period 1946 to 1959, (the only period for which detailed figures were presented) the carload tonnage of Seaboard and Coast Line for these commodities increased by 100 percent, and revenues by more than 150 percent (320 I.C.C. at 148-149, 232).

Coast Line and Seaboard are two of the largest railroads in the Southeastern area of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia. The merged company will be substantially larger than any other railroad in the Southeast.[3] It will operate more than half of the rail lines in the Southeast and more than 80 percent of the rail lines in Florida. Moreover, the merged company will control the Louisville

[2] The major commodities handled by the two roads are: Phosphate rock; Stone and rock; Pulpwood, Bituminous coal; Gravel and sand; Fertilizers, Cement, Paperboard, fiberboard, and pulpboard, and Bentonite (320 I.C.C. at 231-232).

[3] Based on 1964 data, the merged company would have combined revenues of $361,977,383 and assets of $1,095,217,741. Bureau of Accounts, ICC, Transport Statistics in The United States (1965) Part I, pp. 185, 189, 340, 346. The Southern Railway Company, which will rank next to the merged company, operates 9,045 miles of track (320 I.C.C. at 163). It had revenues in 1964 of $291,913,385, and as of December 31, 1964, assets of $941,204,305. *Id.*, Part I at pp. 341, 344.

and Nashville Railroad Company (L & N),[4] another of the large railroad systems in the Southeast (320 I.C.C. at 139, 141, 163).

The Commission approved the proposed merger. It recognized that the merger would eliminate existing competition between Seaboard and Coast Line and create a rail monopoly in parts of Florida (320 I.C.C. at 165). The Commission concluded that rail competition would remain throughout most of the Southeast after the merger, and that traffic subjected to the monopoly of the merged company was insignificant compared with the total movement of goods in the Southeast by all forms of transport (320 I.C.C. at 211). Rail competition, the Commission further found, was unnecessary because of the presence of competition from other forms of transport, notably truck and barge lines, and the protection afforded by the regulatory powers of the Commission over rail rates and practices (320 I.C.C. at 212). Any anticompetitive consequences of the merger, the Commission asserted, would be further mitigated by the conditions to be imposed on the merger[5] (320 I.C.C. at 207-208).

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[4] The L&N operates 5,696 miles of track (320 I.C.C. at 141). It had revenues during 1964 of $259,500,964, and as of December 31, 1964, assets of $902,581,311. *Transport Statistics*, Part I, pp. 263, 276.

[5] The Commission imposed 14 conditions upon the merged company (320 I.C.C. at 267-269, Appendix XI). Conditions 1-13 are intended to minimize loss of traffic by competing railroads by requiring open routes and gateways and by providing for the creation of new "reprisal routes" (320 I.C.C. at 208-209). The final condition establishes a mechanism by which East Coast and the eight other small railroads whose operations, the Commission recognized, would be severely injured, could be included in the merged company (320 I.C.C. at 210). It is the position of East Coast that, as the district court held in its initial opinion, the conditions

The Commission ultimately concluded that the anticompetitive effects of the merger were outweighed by the savings in operating expenses to the merged company of $20 million annually resulting from elimination of employees and duplicating facilities of the merging roads (320 I.C.C. at 212). It was "axiomatic", the Commission concluded, that these savings would redound to the benefit of the public in the form of improved facilities, more efficient service, and lower rates (320 I.C.C. at 206-207).

The district court, in its initial review of the Commission's order, held that antitrust policy to be given any effect whatsoever in railroad merger cases, required the Commission to determine whether the effect of a proposed merger "may be substantially to lessen competition" or "tend to create a monopoly" as those terms are used in the Clayton Act. This task, the district court held, had not been undertaken by the Commission in terms of the relevant geographic and service markets affected by the proposed merger (App. C, *infra*, pp. 61a, 63a, [illegible]).

On appeal, this Court vacated the judgment of the lower court holding that, under *McLean Trucking Co.* v. *United States*, 321 U.S. 67, and *Minneapolis & St. L. R. Co.* v. *United States*, 361 U.S. 173, the Commission

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imposed on the merger uniformly assume that railroad interest is always equivalent to the public interest (App. C, *infra*, pp. 64a-65a). East Coast argued below that: (a) the establishment of "reprisal" routes for the benefit of railroads is not in the public interest; (b) the establishment of new routes and open gateways at and north of Jacksonville, Fla., does not alter the monopoly power of the merged company or restore rail competition in Florida; and (c) inclusion of East Coast and other affected railroads would extend the monopoly of the merged company, a result not supported by the Commission findings.

was not required to measure railroad mergers by the standards of the antitrust laws. The case was remanded to the district court for a full review of the administrative order and findings pursuant to the standards enunciated by this Court. "The problem is one of accommodation of § 5(2) and the antitrust legislation. The Commission remains obligated to 'estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the overall transportation policy.'" (App. B, *infra*, pp. 52a-53a; 382 U.S. 154)

The district court on remand sustained the Commission's orders authorizing the merger. The court held there was absolutely no doubt that, judged by the standards of the antitrust law, this merger would fail, at least as to Florida (App. A, *infra*, p. 24a). The court concluded, however, that approval of the merger was within the power of the Commission despite the court's misgivings as to the adequacy of the record and the judgments made by the Commission (App. A, *infra*, pp. 20a, 23a, 41a, and n. 30, 36). The Commission, the court concluded, had recognized the danger areas in the proposed merger and had made findings, in terms of the public interest, equal in most respects to those made in the motor carrier consolidation approved in *McLean Trucking Co.* v. *United States*, 321 U.S. 67.[6] The district court noted two distinctions

[6] The *McLean* case involved consolidation of seven motor carriers. The Commission's decision authorizing the consolidation is reported in *Associated Transport, Inc., Control and Consolidation*, 38 M.C.C. 137.

between the motor carrier consolidation involved in *McLean* and the railroad merger approved here: Entry in the motor carrier field is relatively easy, but virtually impossible in railroading; The motor carrier created by the consolidation in *McLean* would continue to have substantial motor carrier competitors, but the railroad created by the merger of Seaboard and Coast Line would have a rail monopoly at least in parts of the Southeast (App. A, *infra,* pp. 28a, 32a, 38a). Those distinctions, the district court concluded, were overcome by the "new policy" adopted by the Commission in this case for appraising anticompetitive effects of a proposed rail merger. This new policy, as the district court saw it, was to emphasize competition between the various modes of transport rather than competition among carriers of the same mode. In the court's opinion, the Commission has power to adopt such a policy (App. A, *infra,* pp. 41a-42a).

The district court characterized as "cogent" an argument that the dollar savings to the railroads resulting from a merger of two prosperous and financially healthy roads are insufficient to overbalance the anticompetitive effects of the merger. The court held, however, that the Interstate Commerce Act required the Commission to give primary emphasis to the public interest factors specified in section 5(2)(c) and not to antitrust law and policy (App. A, *infra,* pp. 36a-37a).

THE QUESTIONS ARE SUBSTANTIAL

This case presents important issues in the accommodation of antitrust policy with the merger provisions of the Interstate Commerce Act. Merger of Seaboard and Coast Line is one of twenty-one pend-

ing, major railroad mergers involving 75 percent of the nation's railroad assets. Disposition of these cases will vitally affect the future of transportation in every part of this country.

The issues presented in this case are important because the Commission adopted, and the lower court sustained, public interest standards effectively eliminating antitrust policy of preserving competition and preventing monopoly from rail merger proceedings. Antitrust policy has been effectively written out of railroad mergers by finding dollar savings, realized by eliminating facilities and employees necessary to conduct present competitive railroad services, to be the "foremost" public benefit justifying merger, without any finding that the dollar savings to the merged railroad are necessary for, or are related to the public interest in sustaining and improving transportation service. Under the Commission's view of the public interest, the elimination of competition in the railroad industry is, of itself, a public benefit since an arithmetic showing of savings can be made in any case involving the elimination of competing services. In fact, the more extensive and significant the competition to be eliminated, the greater the dollar savings and the greater the presumed public benefit to be achieved by merger.

We submit, further, that the National Transportation Policy condemns the Commission's reliance upon intermodal competition as an effective substitute for the present Seaboard-Coast Line competition without any findings respecting the extent to which the present Seaboard and Coast Line traffic is immune from intermodal competition because of the inherent advantages of rail transport.

These issues, as we shall point out, are now ripe for plenary review by this Court.

1. Commission approval of the proposed merger was predicated upon the substantial savings of $20 million the Commission estimated the merging railroads could realize from the elimination of duplicate facilities and functions (320 I.C.C. at 207).[7] At least half of these savings, it was acknowledged, would come from the elimination of 4,257 jobs and the relocation of 4,439 other employees (320 I.C.C. at 154, 157).

These savings were the essential basis for the Commission's conclusion that the public benefits accruing from the merger outweigh the anticompetitive consequences of the merger. If projected savings achieved from the elimination of facilities and employees essential to competing railroad operations are—of themselves—public benefits justifying the elimination of competition, antitrust law and policy has been effectively deleted from the standards to be applied by the Commission in considering railroad mergers. Accommodation of antitrust law and policy with the merger provisions of the Interstate Commerce Act and National Transportation Policy, as required by this Court's decisions in *McLean and Minneapolis,* compels at the very least findings demonstrating that these

[7] The Commission concluded that a total of $20,000,000 could be realized from the following: (1) Elimination of duplicating stations and terminals—$4,400,000 (320 I.C.C. at 158); (2) Abolition of 4,257 jobs and relocation of 4,439 employees—$10,200,000 (320 I.C.C. at 157); (3) Increase in freight revenues by diverting to the lines of the merged railroads, traffic which the Seaboard and Coast Line now handle in conjunction with other railroads—$4,900,000 (320 I.C.C. at 157); and (4) Elimination of duplicate repair facilities, and combining transfer facilities used for handling less-than-carload freight—$500,000 (320 I.C.C. at 157, 158).

savings are directly related to the realization of the objectives of the National Transportation Policy and which, in the absence of merger, can not be realized effectively. We think that the Commission's report wholly fails to demonstrate that the savings to the railroads—bought at the price of monopoly and elimination of existing rail competition—are related to any public benefit.

The report of the Commission, after reciting the anticipated savings, states that the savings should enable the merged company to meet effectively the increasing competition from other modes of transport, increase the financial stability of the merged company, bring about a reduction in the cost of rail service to the public, assure adequate future transportation service in the entire Southeastern States and permit a more coordinated economical, efficient, and expeditious service to the public (320 I.C.C. at 207). Financial stability and economic, efficient, and adequate service are, of course, objectives of transportation regulation under the National Transportation Policy. But the Commission's findings fail to establish the essential connection between savings to the merged railroads and these public interest objectives. For example, if dollar savings to the merging railroads are public benefits because they strengthen the financial stability of the merging companies, there must be some findings to establish that Seaboard and Coast Line are now unstable or, at the minimum, that additional financial strength will enable the merged company to carry out programs of improvement which they cannot achieve as individual railroads. But there are no findings to this effect in the Commission's report and none are possible. Seaboard and Coast Line, as individual rail-

roads, are prosperous railroads with ample resources to carry out any capital improvements necessary for adequate, safe, efficient, and economical service. The Commission notes in its report that Seaboard and Coast Line are currently in healthy financial conditions and past earnings records are impressive (320 I.C.C. at 146, 149). The Commission, observes that, the rates of return earned by Seaboard and Coast Line individually are above the average for the railroad industry, but are below that of other modes of transport and other industries (320 I.C.C. at 149). The Commission never discloses what, if any, significance this comparison may have for this case.[8] The

[8] The court, relying upon the Commission's characterization of the rates of return of Seaboard and Coast Line as not comparable with that earned by other industries and modes of transport, concluded that it *may* not be entirely accurate to refer to the Seaboard and Coast Line as financially healthy railroads. Rate of return, the court noted, *may* affect the ability of a railroad to obtain required capital funds from commercial sources at current interest rates. (App. A, infra, pp. 37a-38a)

This holding by the district court illustrates another vice of the Commission's report in this case. The Commission did not find that Seaboard and Coast Line have been unable to borrow at current interest rates from commercial sources when required, or that these railroads need additional funds that can not be supplied from their own surplus or reserve for capital improvements. Such findings could not be made on this record. Seaboard had in 1962 a capital surplus of $53.9 million and retained income of $151.3 million, while Coast Line had capital surplus of $9.5 million and retained income of $256.9 million (320 I.C.C. at 146-147)

This Court has repeatedly condemned imprecise administrative findings which leave important issues to conjecture and the *post hoc* rationalizations of the contending parties. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168; *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 196-197; *Atchison T. & S. F. R. Co.* v. *United States*, 295 U.S. 193, 201-202. Judicial review in this important case should not depend on the proposition that "it may not be entirely accurate" to refer to the merging railroads as financially healthy.

fundamental differences in railroad financial structure as compared with other carriers and other industries are frequently thought to justify a difference in the rates of return.

The Commission concludes that the dollar savings will assure adequate future transportation in the Southeastern States. There are, however, no findings that adequate future transportation service by these railroads is in any danger in the absence of this merger. The Commission imposed no requirement that the dollar savings be used by Seaboard and Coastline for any specific purpose claimed to be related to an improvement in service. The Commission nowhere finds that Seaboard and Coast Line are not now able to compete with other forms of transport. The report demonstrates in fact that Seaboard and Coast Line have dramatically increased revenues and volume in the transportation of bulk commodities which constitute the basic rail traffic. In the end, the Commission is forced to attempt the essential connection between costs savings to the railroads by eliminating competitive facilities and the public by concluding that: ". . . it is axiomatic that the elimination of wasteful and unnecessary facilities and services will redound to the benefit of the public generally" (320 I.C.C. at 207).

We submit that the history of the regulation of railroads and the policy of the antitrust laws deny that savings realized by a railroad monopoly will redound to the benefit of the public. Accommodation of the antitrust laws with Interstate Commerce Act on such a basis effectively excludes preservation of railroad competition and prevention of monopoly from the concept of public interest. Competition obviously requires duplicate facilities. Antitrust policy assumes

that the public benefits to be realized from competition justify the costs of such duplication. The Commission has written that concept out of railroad mergers and the district court has sustained that result.[9] This ultimate issue of public interest under the Interstate Commerce Act should be resolved by this Court.

2. The district court concluded that the Commission had announced, in approving the merger of Seaboard and Coast Line, a new policy of reliance on intermodal competition rather than competition among railoads to promote the public interest. This policy and its application to this case was within the power of the Commission and was not arbitrary or capricious on this record, in the opinion of the district court (App. A, *infra*, pp. 41a-42a).

Whatever it may be labeled, the Commission's analysis of the anticompetive consequences of this merger is inadequate. The Commission's disregard of rail competition is not supported by the record and flatly contradicts the National Transportation Policy established by Congress.

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[9] The district court may have believed that this public interest issue had not been urged before the Commission, since the court noted that, if the argument were made before the Commission, it "would doubtless be given weight" (App. A, *infra*, p. 36a). The fact is that the argument was made repeatedly before the Commission. The Department of Justice in its initial brief to the Commission dated October 30, 1961, made the contention at page 2. The argument was reiterated and amplified in Justice's Exceptions to the examiner's report, dated December 7, 1962, at pp. 18-19, 101-103. East Coast took the same position in its Exceptions dated December 7, 1962, at pp. 69-71, and raised the issue in oral argument held May 7 and 8, 1963, before the entire Commission. See Transcript of Oral Argument, pp. 5541, 5551.

The Commission's treatment ignores the inherent advantages of railroads in terms of cost, service, and utility, not possessed by other modes of carriage. The district court in this case noted the limited extent to which Seaboard and Coast Line traffic in phosphate rock is subject to competion from trucks and water carriers (App. A, *infra*, pp. 19a-21a). The bulk of the traffic transported by Seaboard and Coast Line consists of commodities for which railroads possess distinct advantages over other forms of transport. Intermodal competition is not a substitute, from the standpoint of the public interest, for competition among railroad competitors each of which possess the same inherent advantages. The Commission has itself previously recognized this important principle. In *Santa Fe Trail Stages, Inc., Common Carrier Application*, 21 M.C.C. 725, 748-749 (1940), the Commission held:

> Regulated monopoly is not a complete substitute for competition. The latter fosters research and experimentation and induces refinements in service which are not likely otherwise to be accomplished. 'Nor is it enough to say that rail and air service and the private automobile provide all the stimulus required, as vigorously contended by protestants . . . Competition from within the field of one's endeavor is one thing; that from without is quite another. Those inclined to patronize a bus service, for instance, may find its inherent advantages sufficiently attractive to induce them to use such service as is offered without demanding more. Thus, competition from without is met by the inherent advantages of a possibly inferior service, and the operator thrives while the patrons are denied that ultimate in service and convenience which they have a right to expect and which would be fostered by direct competition from within the field of endeavor.

Adequate analysis of inherent railroad advantages is essential to a proper discharge of the complex and important responsibility of the Commission in these important rail merger proceedings. A policy that ignores the public interest in competition among railroads loads the scales in favor of merger. Moreover, freedom from effective competition, because of inherent cost and service advantages, destroys any basis for a presumption that cost savings to the railroads will inevitably redound to the benefit of the public.

CONCLUSION

This case presents important questions in the accommodation of antitrust policy and the Interstate Commerce Act provisions authorizing the Commission to approve railroad mergers. Probable jurisdiction should be noted.

Respectfully submitted,

A. ALVIS LAYNE
EUGENE M. MALKIN
948 Pennsylvania Building
Washington, D. C.
Attorneys for Appellant Florida East Coast Railway Company

FREDRICK H. KENT
Florida National Bank Building
Jacksonville, Florida
Of Counsel

October 1966

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 64-64-Civ. J.

FLORIDA EAST COAST RAILWAY COMPANY, a corporation, ET AL., *Plaintiffs,*

versus

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants.*

Judgment

In accordance with the opinion of the court and the special concurrence this day filed, IT IS ORDERED, ADJUDGED and DECREED by the court that the injunction prayed for by the plaintiffs be denied and that judgment be entered in favor of the defendants.

The costs are taxed against the plaintiffs, except that no costs are taxed against the United States.

Done this the 8th day of June 1966.

RICHARD T. RIVES
Richard T. Rives
United States Circuit Judge.

BRYAN SIMPSON
Bryan Simpson
United States District Judge.

WILLIAM A. MCRAE, JR.
William A. McRae, Jr.
United States District Judge.

Opinion

Before RIVES, Circuit Judge, and SIMPSON and MCRAE, District Judges.

RIVES, Circuit Judge:

Our first opinion[1] in this case was vacated and remanded by the Supreme Court and we have now considered the Interstate Commerce Commission's action anew. The Interstate Commerce Commission,[2] by an order entered in December 1963, authorized the merger of the Atlantic Coast Line Railroad Company[3] with the Seaboard Air Line Railroad Company,[4] subject to certain routing and gateway conditions and employee protective conditions. Related acquisition of control by Seaboard of carriers subsidiary to or affiliated with Atlantic, most prominently including the Louisville and Nashville Railroad Company, was also authorized. 320 I.C.C. 122 (1963). Florida East Coast Railway Company[5] brought suit in this Court asking that the ICC's order be enjoined, annulled and set aside.

A three-judge district court was convened pursuant to 28 U.S.C.A. § 2325. The Attorney General, representing the United States, opposed the merger and therefore the United States was realigned as a party-plaintiff. The Railway Labor Executives' Association, the Southern Railway Company,[6] and its affiliated companies in the Southern Railway System intervened as parties-plaintiff. At the hearing on remand the City of Tampa also intervened

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[1] Florida East Coast Ry Co. v. United States, 242 F. Supp. 14, *rev.*, 382 U.S. 154 (1965).

[2] Hereafter Commission or ICC.

[3] Hereafter Atlantic or ACL.

[4] Hereafter Seaboard or SAL.

[5] Hereafter FEC.

[6] Hereafter Southern.

as a party-plaintiff. In addition to defendant ICC, the Mercantile-Safe Deposit and Trust Company, the Seaboard and the Atlantic, all intervened as parties-defendant. In this posture issue was joined.

After submission of briefs and full argument, in our first opinion we set aside the ICC's order and remanded the case to the Commission for further proceedings. Our reasoning was two-fold. First, we determined that the ICC's analysis of the merger was defective because it failed to apply proper product and geographic market criteria as explicated in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962). Second, we held that the Commission erred in not specifically determining whether the merger violated section 7 of the Clayton Act, 15 U.S.C.A. § 18 (1964 ed.). The Supreme Court vacated our judgment and remanded "for a full review of the administrative order and findings pursuant to the standards" they had previously "enunciated." 382 U.S. 154 (1965).[7]

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[7] In explaining the proper scope of review, the Supreme Court said:

> "We believe that the District Court erred in its interpretation of the directions this Court set forth in *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), and *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173 (1959). As we said in *Minneapolis*, at 186:
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> "'Although § 5(11) does not authorize the Commission to "ignore" the antitrust laws, McLean Trucking Co. v. United States, 321 U.S. 67, 80, there can be "little doubt that the Commission is not to measure proposals for. [acquisitions] by the standards of the antitrust laws." 321 U.S., at 85-86. The problem is one of accommodation of § 5(2) and the antitrust legislation. The Commission remains obligated to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the over-all transportation policy." 321 U.S., at 87.'" (382 U.S. at 156.)

This case presents a head-on collision between the antitrust laws and the Interstate Commerce Act. It is incumbent upon us to seek to rationalize the statutes involved here and make of them, to the extent that what Congress has written will permit, a harmonious functional body of law. Section 5(2) directs the Commission to approve voluntary rail mergers which it finds to be "consistent with the public interest," but reserves to the Commission power to approve the merger subject to such "terms and conditions" as it may find to be "just and reasonable." Section 5(2)(c) of the Interstate Commerce Act, which sets forth certain factors which must be considered by the ICC in passing upon any proposed railroad merger or affiliation, does not expressly require that the Commission consider the antitrust laws as a factor in the public interest. However, since section 5(11) exempts carriers and individuals participating in an approved merger from the antitrust laws, the ICC has long been required to give weight to the antitrust policy of the Nation in approving mergers.[8] It

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[8] Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945) at 456; McLean Trucking Co. v. United States, 321 U.S. 67 (1944) at 79-80, 87. The Commission in the instant case clearly recognized this duty when it said (320 I.C.C. at 128-29, 206):

> "However, we may not disregard the policy underlying the antitrust laws even though carriers participating in a merger are relieved by section 5(11) from the operation of such laws. *Minneapolis & St. Louis R. Co.* v. *United States, supra* [361 U.S. 173]. Our primary task is to reconcile the objective of 'preventing injurious waste and in securing more efficient transportation service,' *New York Central Securities Corp.* v. *United States, supra,* [287 U.S. 12], at 26, with the general concern of Congress 'that tendencies toward concentration in industry are to be curbed in their incipiency, particularly when those tendencies are being accelerated through giant steps striding across a hundred cities at a time.' *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 346 (1962). In short, our 'problem is one of accommodation of section 5(2) and the

is the accommodation of the national transportation policy with the national antitrust policy with which this litigation is chiefly concerned.

The records and briefs in this case read far more like an antitrust case or FTC review proceeding than like an action to set aside an order of the ICC. This aspect can only be indicative of one fact—at some point the orderly administrative process envisioned by Congress has been derailed. All too much time has been consumed in showing a violation of the antitrust laws and too little time devoted to assessing the "public interest" as expressed in the Interstate Commerce Act. Review of ICC proceedings, while in many respects quite similar in appearance to FTC review, is substantially different.

It is not without significance that Congress placed review of proceedings of the FTC in the Courts of Appeals and those of the ICC in a three-judge district court. Each has three judges, but there the comparison ends. The FTC is to administer a group of statutes whose meaning and content are primarily entrusted to the judiciary for rational extrapolation. There was no intention on the part of Congress that the FTC should become a plenary body, reshaping American industry to a model which the Commission in its own wisdom decided best served the Nation. On the contrary, the FTC was to prevent "unfair competition" in widely divergent industries, preserving the

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antitrust legislation.' *Minneapolis & St. Louis R. Co.* v. *United States, supra,* at 186.

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"Although section 5 transactions are immunized from the operation of the antitrust laws, the policy reflected by such laws is nevertheless an important element in determining public interest. As we have stated, we are confronted here with the task of accommodating section 5 and the antitrust laws, and in so doing, we must reconcile the numerous conflicting considerations that are inevitably involved."

existing price system so fundamental to the American way of life.

Review of such proceedings could easily be fitted into the normal appellate process. A one-hour argument coupled with briefs sufficient to phrase out the issues with which courts of appeals routinely deal, allow a circuit court to give a carefully studied review.

The ICC stands in a uniquely different posture. Congress has vested the Commission with "exclusive and plenary" powers in the regulation of rail mergers. No one who reviews the history and language of the Interstate Commerce Acts can doubt that Congress has entrusted the ICC with plenary power to regulate almost every aspect of the rail industry and, for that matter, almost every aspect of the transportation industry save the airlines.[9] The ICC is in many ways a super-management, often making managerial-type decisions affecting the transporation industry, with but one overriding duty—to protect the public interest.[10] A rail carrier cannot change rates without ICC approval, and the ICC can on its own initiative investigate and alter rates after proper findings.[11]

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[9] 49 U.S.C.A. § 1, et seq.

[10] In United States v. Pierce Auto Lines, 327 U.S. 515 (1946) at 535-36, the Supreme Court said: "We think the court [below] misconceived * * * its own function. It is not true, as the opinion stated, that * * * 'the courts must in a litigated case, be the arbiters of the paramount public interest.' This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted." See United States v. Trucking Co., 310 U.S. 344 (1940). This was the role in which the ICC saw itself cast in the instant case (320 I.C.C. at 206): "In fact, as guardian of the public interest, it is our responsibility to determine whether the proposed merger will, as required by the national transportation policy, contribute to the development and maintenance of a public transportation system which will meet the needs of our Nation's commerce and or national defense."

[11] 49 U.S.C.A. § 15.

New services cannot be provided nor old ones discontinued without Commission approval.[12] No new railroad may enter the field without ICC permission; the Commission may compel an existing railroad to extend its line and provide new service.[13] We have, in effect, a government-protected monopoly for those already providing service. In the area of rail mergers and consolidations, Congress' intention to let the ICC plan the structure of the national transportation industry has long been apparent.[14] World War I with the government take-over of the rail system had left this Nation's primary transportation system in a state of dilapidation. War needs had diverted critical materials to other areas of the economy and needed rail repairs had been neglected.

Congress, therefore, determined that the health and vitality of the Nation's railroads could best be restored by merging them into fewer, more efficient systems than then existed. Congress realized that it was functionally not the appropriate body to study and determine which railroads should be combined. It had neither the time nor the facilities. The Transportation Act of 1920 thus for the first time conferred upon the ICC "exclusive and plenary" power over rail mergers. The Commission was directed to "prepare and adopt a [master] plan for the consolidation of the railway properties of the continental United States into a limited number of systems.[15] However, the Commission was not given power to force consolidation. It had to come voluntarily. Only mergers which were in harmony with the master plan could be

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[12] 49 U.S.C.A. §§ 1, 13(a).

[13] 49 U.S.C.A. § 1.

[14] For a brief background note on the present section 5, see appendix to Justice Frankfurter's opinion in St. Joe Paper Co. v. Atlantic Coast Line Co., 347 U.S. 298 (1954), at 315.

[15] 41 Stat. 481.

approved. Approved mergers were exempt from the anti-trust laws.

It was apparent almost from the outset that the master plan approach had set an impossible pattern. The Transportation Act of 1940 took a more realistic view.[16] It abandoned the idea of a master plan, as such, and adopted a more flexible approach which authorized the ICC to approve carrier-initiated voluntary plans for mergers if those plans conformed to a public interest test prescribed by the Act. A requirement, relating to the preservation of competition contained in the 1920 Act was deleted by the 1940 Act. The initiative to formulate plans for consolidation or merger thus passed from the Commission to the rail carriers; but exclusive and plenary power to grant permission for such mergers subject to such conditions as might be preseribed was left with the ICC.[17]

Unlike review of FTC proceedings, review of ICC approved mergers involves the review of intricate, expert plenary judgments in a highly specialized area of our economy that has long been subject to direct precise regulation.[18] The ICC was authorized to make *ad hoc* deter-

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[16] 54 Stat. 905.

[17] While there were many who desired to give the Commission power to compel mergers, Congress declined the invitation to confer that power. St. Joe Paper Co. v. Atlantic Coast Line Co., 347 U.S. 298 (1954); Brotherhood of Maintenance of Way Employees v. United States, 221 F. Supp. 19 (E.D. Mich. 1963), *aff'd*, 275 U.S. 216.

[18] In Ayrshire Corp. v. United States, 335 U.S. 573 (1949), at 592-93, the Supreme Court stated:

> "Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well. And when it undertakes to rationalize the interests of the three, great complexities are often encountered. The economics of the bituminous coal industry have baffled even experts. We would depart from our competence and our limited function in this field

minations within the interstices of individualized records. It is appropriate that initial review should be in a district court, where each case may be set for hearing individually with as much time as necessary allotted. This case is a good illustration. Our last hearings took a full day, and could not have been compressed into the short time usually provided for appellate arguments.

This Court must not shirk its duty by providing only a perfunctory review. But we are equally bound to keep our review within the limits intended by the statutory scheme of this particular agency.[19] We would be no friend of the administrative process if we were to leave the Commission at large, free to roam from one arbitrary or capricious act to another. If judicial review is to have a

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if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it. In fashioning what the Commission called a differentially related and finely balanced rate structure for this coal, there is no place for dogma or rigid formulae. The problem calls for an expert, informed judgment on a multitude of facts. The result is that the administrative ratemaker is left with broad discretion as long as no statutory requirement is overlooked. Yet that is, of course, precisely the nature of the administrative process in this field. See *Board of Trade* v. *United States*, 314 U.S. 534, 548; *New York* v. *United States*, 331 U.S. 284, 347-349."

See ICC v. Parker Motor Freight, 326 U.S. 60 (1945); American Trucking Association v. United States, 344 U.S. 298 (1952); Hudson & Manhattan R. Co. v. United States, 313 U.S. 98 (1941); Carolina Secenic Stages v. United States, 202 F. Supp. 919 (W.D. S.C. 1962); Penn. R. Co.—Merger—N.Y. Central Ry. Co., 327 I.C.C. 475 (1966), at 505. In East Texas Lines v. Frozen Food Export, 351 U.S. 49 (1956), at 54, the Supreme Court said: "The Commission is the expert in the field of transportation. And its judgment is entitled to great deference because of its familiarity with the conditions in the industry which it regulates."

[19] See, for example, comment in dissenting opinion of Justice Frankfurter, Stark v. Wickard, 321 U.S. 288 (1944), at 311.

basis for functioning, the ICC must do more than announce its ultimate conclusions by way of unrationalized fiat.[20] The Commission must explain its reasoning in clear and precise terms. It must support its application of that reasoning to the instant case by substantial evidence in the record on which we must base our review.[21] It is for us to determine whether the ICC has correctly applied the proper standards, and thus exhibited that familiarity with the problems in the transportation industry which Congress anticipated the ICC would achieve from its particularized experience.[22]

The plaintiffs, and particularly the United States through the Antitrust Division of the Justice Department, vigorously attack the standards applied by the ICC in

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[20] Florida v. United States, 282 U.S. 194 (1930), at 208, 211-12, 215; S.E.C. v. Chenery Corp., 318 U.S. 80 (1943); Cf. Brook v. NLRB, 348 U.S. 96 (1954); United States v. American Sheet Tin Plate Co., 301 U.S. 402 (1937); Morehouse v. United States, 194 F. Supp. 940 (D. Neb. 1961), *aff'd*, 368 U.S. 348; Ayrshire Corp. v. United States, 335 U.S. 573 (1949); Brotherhood of Maintenance of Way Employees v. United States, 221 F. Supp. 19 (E.D. Mich. 1963), *aff'd*, 275 U.S. 216; Ace Lines, Inc. v. United States, 197 F. Supp. 591 (S.D. Iowa 1960); Southern Railway Co. v. United States, 167 F. Supp. 747 (M.D. Ga. 1958), at 753.

[21] See United States v. Pierce Auto Lines, 327 U.S. 515 (1946); Boston & M. R.R. v. United States, 208 F. Supp. 661 (D. Mass. 1962), *aff'd*, 371 U.S. 26; Brotherhood of Maintenance of Way Employees v. United States, 221 F. Supp. 19 (E.D. Mich. 1963), *aff'd*, 275 U.S. 216; Atchison T. & S.F. Ry. v. United States, 244 F. Supp. 955 (N.D. Ill. 1965), *appeal pending*. Cf. Gray v. Macy, 239 F. Supp. 658 (D. Ore. 1965).

[22] See Ayrshire Corp. v. United States, 335 U.S. 573 (1949), at 592-93; American Trucking Association v. United States, 344 U.S. 298 (1953), at 313-14; see also, United States v. Trucking Co., 310 U.S. 344 (1940); Hudson & M. R. Co. v. United States, 313 U.S. 98 (1941); Chicago S.S. & S.B. R.R. v. United States, 221 F. Supp. 106 (N.D. Ind. 1963); Stark v. Wickard, 312 U.S. 288 (1944), at 309-10; Nashua Motor Express, Inc. v. United States, 230 F. Supp. 646 (D. N.H. 1964).

this case. They argue that the ICC failed to properly assess the dangers of this merger, because it failed to apply or misapplied the teachings of modern sophisticated antitrust principles. To understand how national antitrust policy comes into play, it is well at this point for us to review the relationship of section 5(2)(c) and section 5(11) of the Interstate Commerce Act. In approving a rail merger or consolidation the ICC is required by section 5(2)(c) to

> "give weight to the following considerations, *among others:* (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." (Emphasis added.)

Any reference to antitrust policy must be read into the words "among others" by implication, since section 5(11) exempts participants in an approved merger:

> "from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved * * * and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction."

There is and could be no dispute that, in determining whether a given merger is in the public interest, the Commission should take into account the national antitrust policy of the United States.[23] Mr. Justice Black, speaking for the Court in *Northern Pacific Railway Co.* v. *United*

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[23] See n. 8, *supra.*

States, 356 U.S. 1 (1958) at 4, clearly stated the essence of antitrust policy as follows:

> "The Sherman Act was designed to be a comprehensive charter of economic libetry aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

The Congress in 1940 enacted the following "National Transportation Policy":

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. *All of the provisions of this Act shall be administered and enforced*

with a view to carrying out the above declaration of policy." (49 U.S.C.A. Historical note following table of contents.) (Emphasis added.)

The main thrust of plaintiffs' argument is that this merger eliminates substantial competition between Seaboard and Atlantic, and in some areas even creates an effective monopoly over the transportation of certain products. This it is argued violates not only the antitrust policy but also the transportation policy of the United States since it fails to "preserve the inherent advantages of each" mode of transportation. Proof of these allegations is sought in a resort to modern sophisticated antitrust principles.

On remand the plaintiffs deny any intention to force the ICC to decide whether a violation of section 7 of the Clayton Act or of the Sherman Act has taken place. But at the same time they argue that the Commission must apply modern sophisticated antitrust market analysis and point to cases like *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962) and the concepts of market definition there expressed as examples of how the ICC should have analyzed this merger.[24] It seems pointless to say that the

[24] The Commission has recently rejected the plaintiffs' demand that it slavishly adhere to the *Brown Shoe* market analysis. Penn. R. Co.—Merger—N.Y. Central Ry. Co., 327 I.C.C. 475 (1966), at 509. In Great Northern Pacific & Burlington Lines, Inc.—Merger—Great Northern Railway Co., I.C.C. (1966), at , (F.D. No. 21478) ms. pp. 65-66, the Commission explained: "Since the *McLean* case [321 U.S. 67] requires an appraisal of adverse competitive effects following the merger, Justice and other opponents of the merger assert that it is appropriate, if not necessary, to determine the areas of effective competition through an analysis of the relevant geographic and product markets, as those terms are used in antitrust cases. Cf. *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962). The Supreme Court in *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154, in reversing *Florida East Coast Ry. Co.* v. *United States*, 242 F. Supp. 14 (M.D.

Commission must employ market definition tools calculated to show whether an antitrust violation has taken place, and when it reaches the point where a conclusion may be properly drawn, it may then stop since it need not draw any conclusions. But this illogical mode of behavior would be the result of following both the plaintiffs' rationale and the Supreme Court's recent opinion in this case.

Much confusion would have been eliminated in this case had everyone agreed that market analysis has but one function—to help pinpoint the danger areas. This tool is not a qualitative tool. It tells where one may expect a monopoly or a substantial lessening of competition in a given line of commerce carried on in a given geographical area. It does not tell whether this is good or bad. For purposes of the antitrust policy, Congress through its statutes has told us at what point restraints and monopolies are bad. For the purpose of the national transportation policy, Congress has told us that not all re-

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Fla. 1965), clearly held that the Commission need not determine whether the proposed merger, absent Commission approval, would violate Section 7 of the Clayton Act, and that in appraising the competitive effects of a proposed rail merger the Commission need not apply yardsticks developed for the purposes of the antitrust laws. The market criteria of *Brown Shoe* can be applied here, if at all, only with great caution and substantial qualification." Later in the report it said (ms. p. 91): "In making the necessary accommodation, the Commission is not required to employ market analysis techniques such as those described in *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962); nor is the Commission required to determine whether, but for the presence of section 5(11), the proposed merger would violate the antitrust laws of the United States. These questions were recently settled in *Seaboard Airline R. Co.* v. *United States,* 382 U.S. 154 (1965), affirming the McLean case and extending its rationale to mergers alleged to be inconsistent with the policy of section 7 of the Clayton Act."

straints and monopolies which violate the antitrust laws are bad.[25] The ICC in its wisdom, and not this Court, is to

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[25] Compare the statement of the Commission in Penn. R. Co.—Merger—N.Y. Central Ry Co., 327 I.C.C. 475 (1966), at 505:

> "The major goals of the antitrust laws are to preserve the independent competitive status of individual firms and to curb the undue concentration of the American economy without any special regard for the effects of this policy in a particular industry. Cf. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 316-23 (1962); *United States* v. *ALCOA*, 377 U.S. 271, 279-80 (1964). By contrast, in the transportation industry which is subject to extensive economic regulation, the worth of competition and not merely its preservation must be considered within the regulatory scheme enacted by Congress. The very fact that Congress has seen fit to enter into the comprehensive regulation of transportation contradicts the notion that competition is favored without qualification. Federal legislation affecting railroads is one of many areas of economic activity in which serious inroads have been made on an original policy favoring competition. *F.C.C.* v. *RCA Communications, Inc.*, 346 U.S. 86, 92-93 (1952). It is only in a blunt, undiscriminating sense that we can speak of competition as an ultimate good. *Ibid*, 92."

The history of the relationship between the Central Pacific Railway Co. (hereafter C.P.R.) and the Southern Pacific [Railroad] Company (hereafter S.P.) is a case in point. In 1914 the United States instituted suit to enjoin the S.P. from controlling the C.P.R., because it violated the antitrust laws. In 1917 the district court dismissed the suit. On direct appeal, the Supreme Court held that the combination of the two railroads "fetters the free and normal flow of competition * * * tends to monopolization [of the affected rail traffic]." United States v. Southern Pacific Co., 259 U.S. 214 (1922), at 229. The Supreme Court went on to say (259 U.S. at 230-32): "We reach the conclusion that the stock ownership in the Central Pacific acquired by the Southern Pacific is violative of the Sherman Act with the principles settled by this court * * * [which] collectively, establish that one system of railroad transportation cannot acquire another, nor a substantial and

determine which are to be allowed and which are to be considered bad. Our task is at an end when we satisfy ourselves that the Commission has made adequate findings supported by substantial evidence, that it has perceived the danger areas, and judging by the statutory standards has concluded that the public interest is best served by allowing the merger.[26]

We had felt that there is value in applying rational economic concepts embodied in modern sophisticated antitrust principles. This was what we undertook to demonstrate in our first opinion. However, as Justice Frankfurter aptly stated in his dissent in *ICC* v. *J-T Transport Co.*, 368 U.S. 81 (1961) at 129-30,

> "An order of the Commission cannot stand, it is true, if we cannot tell what has been decided or if it leaves unclear the basis for its conclusions. *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 510, 511. Findings are no doubt judicially more per-

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vital part thereof, when the effect of such acquisition is to suppress, or materially reduce the free and normal flow of competition in the channels of interstate trade." Following the remand of the *Southern Pacific* case, the C.P.R. and the S.P. applied for and received approval of their transaction by the ICC under section 5 of the Transportation Act of 1920. 76 I.C.C. 508 (1923). In United States v. Southern Pacific, 290 Fed. 443 (D. Utah 1923), the district court sustained the ICC's ruling and entered an order effectuating the transaction even though it found it to be in violation of the Sherman Act.

[26] American Trucking Ass'n, Inc. v. United States, 364 U.S. 1 (1960); East Texas Motor Freight Line v. Frozen Food Express, 351 U.S. 49 (1956); Ayrshire Corp. v. United States, 327 U.S. 515 (1946), at 535-36; Black Ball Freight Service v. United States, 223 F. Supp. 191 (D. Idaho 1963); Lester C. Newton Trucking Co. v. United States, 209 F. Supp. 600 (D. Del. 1962), *aff'd*, 372 U.S. 702; Nashua Motor Exp., Inc. v. United States, 230 F. Supp. 646 (D. N.H. 1964); Carolina Scenic Stages v. United States, 202 F. Supp. 919 (W.D. S.C. 1962); Ace Lines, Inc. v. United States, 197 F. Supp. 591 (S.D. Iowa 1960).

suasive the more felicitously they are formulated and the less they require extraction from a diffuse report. But the Commission is not under statutory duty to set forth its findings in serried array. It is the Court's duty to sustain the Commission's findings if, as here, there is no real difficulty in determining what was decided and on what grounds.

"It is not the Court's function to impose our standards of lucidity or elegance in exposition upon the Commission."

This proposition is one of the things that the Supreme Court told us when it vacated our first decision in this case. Therefore, while rational economic principles contained in antitrust cases may aid us in pinpointing the danger areas, we may not require the ICC to travel to its conclusions only by this route.[27]

One example of the use of rational economic criteria should suffice to demonstrate the problems engendered by by this case. *Brown Shoe* adopts these criteria (370 U.S. at 325-26):

[Product Market]

"*The outer boundaries* of a product market *are determined by the reasonable interchangeability of use or the cross-elasticity of demand* between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. [Citation omitted.] *The boundaries of such a submarket may be determined by* examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses,

[27] See United States v. Pierce Auto Lines, 327 U.S. 515 (1946), at 529, 523-33.

unique production facilities, distinct customers, distinct prices, *sensitivity to price changes,* and specialized vendors." (Emphasis added.)

The Court went on to define the Geographic Market (370 U.S. at 336):

> "The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. * * * The geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant."

Part of the confusion in the present case is occasioned by the assumption that *Brown Shoe* brought something new to the analysis of antitrust problems, i.e., markets, submarkets, geographic area analysis originated with the approach adopted by *Brown Shoe.* This idea is erroneous. The exact same definitional approaches were long ago adopted to test Sherman Act violations. *United States* v. *Corn Products Refining Co.,* 234 Fed. 964 (S.D. N.Y. 1916), 975-977 (per J. Learned Hand), appeal dismissed by agreement, 249 U.S. 621 (1919) cited, *United States* v. *Aluminum Company of America,* 84 S. Ct. 1283 (1964), at 1286, n. 3. The only difference between the Sherman Act approach and the Clayton Act approach is the quantum of effect necessary before a violation is proved.

It is argued that the ICC's failure to utilize sophisticated antitrust market definition tools is evidence that it failed to properly assess the merger. This contention must be rejected. The ICC has never applied this approach formally, and yet, in spite of the fact that Judge Learned Hand used it as early as 1916, the Supreme Court has never considered this as evidence of the ICC's failure to properly consider a merger.

It may be helpful to apply this tool in the present case. Railroads have a decided economic advantage in carrying

long-haul, heavy bulk products, e.g., phosphate rock mined principally in the western portion of central Florida. In terms of antitrust analysis, we submit that this service is a separate product market and Florida is the proper geographic area.

Some illustrations should demonstrate the point. Let us assume that railroads can haul phosphate rock 50% more cheaply than the next alternative mode of transportation, trucks. This means that if a truck could haul rock at $1 per pound, railroads could carry it at 50 cents per pound. Physically both of these services are interchangeable. If both modes set the price of hauling at $1, there would be "cross-elasticity of demand" between both.

However, if the railroad companies were owned separately from the trucks and if no products were available to bring a higher return and if space were available, railroads would set their price below $1 but above 50 cents, thus taking the business away from the trucks. Railroads are a submarket of long-haul, heavy, bulk products.

If there were competition by two or more railroads for the bulk business, the price would be set somewhere between $1 and 50 cents, but at such a price as would allocate the business between the roads based on market conditions. If, however, a monopoly is created, the monopoly may set the price at any level between $1 and 50 cents that will maximize its return, because it experiences no competition until the price reaches $1. The monopoly price may in fact be lower than the competitive price, depending on whether a change in the cost of transportation will appreciably affect the ultimate cost of the end product and thus increase or decrease its consumption. Thus a monopolist may pass on cost savings to achieve higher profits where a competitor will take the cost savings as higher profits without passing them on. The record in the present case gives us no data on which to predict what action will

be taken by a railroad possessing a monopoly in the bulk-haul products market of central Florida.[28]

While railroads are able to take the long bulk-haul business from trucks, barges or water carriers enjoy a considerable cost advantage over railroads. Since shipment by barge takes longer than shipment by rail, the cheaper cost is somewhat offset. The record in this case does demonstrate that barges are not physically interchangeabel with railroads as a major competitive mode of phosphate transportation. Barges are not able to serve interior points on phosphate, nor are they able to serve facilities that have special equipment designed solely for loading or unloading rail shipments. See 313 I.C.C. 495 (1961) (railroads able to divert traffic from water carriers even at $1 higher rate than water transportation); 291 I.C.C. 689 (1954) (railroads able to divert traffic from water carriers even at 35 cents higher rate than water transportation). It is, we think, accurate to say that railroads enjoy a decided economic advantage over all other modes of transport on heavy, long, bulk-haul products in central and western Florida. Before we could assess the meaning of any such monopoly, we would have to know much more about the competition experienced by phosphate rock and its end-products. If there are readily ascertainable sub-

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[28] With reference to revenue from phosphate rock, the Commission said (320 I.C.C. at 153):

> "The competition faced by the railroads from other modes of transport in the Tampa area is most apparent with respect to the movement of phosphate rock. While the tonnage of phosphate rock rail shipments increased from 9.8 million tons in 1956 to 11 million tons in 1960, the revenue of the applicant railroads from phosphate rock was less in 1960 than in 1956 by approximately $1.1 million, or 4.5 per cent. This revenue decline is attributable in part to the fact that in 1960, the revenue per ton on phosphate rock was $2.21 as compared with $2.61 in 1956."

This, of course, may only indicate that railroads have priced themselves at a level where cross-elasticity of demand with other modes of carriage will take place.

stitutes, even a monopoly as to phosphate rock might have little meaning. Compare the discussion of bulk, heavy-loading and low-rate coal by rail in *Pennsylvania R. Co.—Merger—New York Cent. R. Co.*, 327 I.C.C. 475 (1966) at 516-517.

The purpose of this example is to demonstrate that the plaintiffs' briefs are correct when they analyze the market structure and conclude that the merger, if allowed, creates a monopoly in parts of Florida and that that monopoly can have significant effects. But that is all market analysis shows. A careful reading of the ICC decision shows that the ICC clearly recognized this fact. The Commission referred to phosphate rock as "esentially a commodity normally handled by rail." 320 I.C.C. at 151. Throughout its report, the ICC recognized that a "monopoly" would be created in parts of Florida. It went on to say: "There is no question that there will be a significant reduction in rail competition in Florida." 320 I.C.C. at 166.[29] There-

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[29] In explaining the objections to the examiner's report, the Commission observed (320 I.C.C. at 139):

> "Of these exceptions, many of which obviously overlap, the most important relate to the anti-competitive consequences of the merger upon the shipping public, communities, and competing railroads. Justice and others contend that the examiner failed to make appropriate findings with respect to the anti-competitive effects and monopolistic consequences of the merger in Florida and in the Southeastern States generally. Their main argument on this issue is that the merger would eliminate or substantially reduce competition and create a potential monopoly in the Southeastern States. * * * Justice emphasizes that the merged company would operate 81 percent of all the class I railway mileage in Florida and would control 54.52 percent of the total southern region class I railroad mileage."

And at 163, the Commission found: "In both the 6- and 8-State areas the merged company would have more than 54 percent of the total railroad mileage, while Southern, its nearest competitor, would have about 34 percent. In Florida the merged company would have approximately 81 percent of the railway mileage in the

fore, the ICC reached the same conclusion that the applica-

State." The Commission did go into more detail on Florida (320 I.C.C. at 164-66):

> "The record here shows that rail competition will exist at every major city with a population in excess of 200,000 except at Tampa. The situation at Tampa and in the central and western portions of Florida is unique in that those areas are served by no other railroads except Seaboard and Coast Line. It is to be observed that in much of Florida, Seaboard and Coast Line heretofore have had what might be described as an imperfect monopoly, or an oligopoly if East Coast is included. On the basis of data contained in the Official List of Open and Prepay Stations, 78 I.C.C. A-43, effective April 15, 1953, and considering only those points at which agents are maintained, Seaboard has been the only railroad serving approximately 60 points in Florida, whereas Coast Line has been the only railroad serving approximately 70 Florida points. Thus, the number of Florida points at which there has been no competition is about 4 times as great as the number of Florida points at which Seaboard and Coast Line have heretofore competed. In our opinion, the diminution of competition within the State of Florida that would result from the proposed merger is largly a matter of degree. At most, the rail monopoly that would result from the merger in portions of Florida would merely supplant the duopoly which has long existed there and from which there have been no appreciable adverse competitive effects upon communities or the shipping public.
>
> "Although the merged company would have a preponderance of the railway mileage in Florida, its lines would connect with other rail carriers in that State at the following points:

"East Coast	Benson Junction, West Palm Beach, Jacksonville, Lake Harbor, Marcy, Miami.
"GS&F (Southern subsidiary)	Jacksonville, Crawford, Hampton, Lake City, Jasper, Lake Butler, Palatka.
"L&N	Chattahoochee.
"Live Oak, Perry & Gulf (Southern subsidiary)	Live Oak, Perry, Slade.
"South Georgia (Southern subsidiary)	Perry, Greenville.
"Southern Railway	Jacksonville.

tion of *Brown Shoe* type analysis would have reached, even though the ICC did it in a practical, not a theoretical, manner. Once we accept the fact that the Commission saw this problem, we can set to one side the mechanics of antitrust law and look to the only real issue, the accommodation of the national antitrust policy with the national transportation policy.

As shown by the record, these railroads receive a substantial increment of their revenue from traffic originating in Florida. It is precisely on this traffic that the monopoly created by the merger will have its greatest impact.[30] The

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"To illustrate further the anticipated effect of the merger upon the public in Florida, at the hearings in Tampa, the area in which the concern of monopoly is most prevalent, 19 shippers testified in support of the merger and 47 others would also have testified in support of it had the examiner not invoked the cumulative evidence rule. By contrast, only four shippers in the area testified in opposition to the merger. In any event, the percentage of railway mileage which would be operated by the merged company in Florida or the 6- and 8-State areas involved does not, standing alone, provide a suitable criterion for determining the sufficiency of the rail competition that would remain after the merger."

The Commission again noted the effect in Florida (320 I.C.C. at 211): "Except in portions of Florida, the overall reduction in rail competition in the Southeastern States will be relatively moderate and inconsequential when viewed in the light of the alternative rail service that will be provided by competitors of the merged company at most of the major industrial centers in the effected area"

[30] As pointed out by the Southern Railway System at oral argument, nine bulk commodities handled by the merging railroads account for approximately 75-77% of their business. See dissent of Commissioner Webb, 320 I.C.C. 214, 230-32. The record does not show what portions of the merging companies' revenues or profits are generated by the carriage of long-haul bulk prodoucts originating in Central and Western Florida. Nor does the record show that effective competition for this type of carriage presently exists in Florida.

Commission appears to have assumed that the equivalent of a conspiracy to fix prices in Florida already exists. The Commission said (320 I.C.C. at 164-165): "It is to be observed that in much of Florida, Seaboard and Coast Line heretofore have had what might be described as an imperfect monopoly * * *. At most, the rail monopoly that would result from the merger in portions of Florida would merly supplant the duopoly which has long existed there * * *."

In *Georgia* v. *Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), the State of Georgia invoked the original jurisdiction of the Supreme Court with a complaint against 20 railroads. Georgia alleged that the railroads had conspired together, through the use of rate bureaus, committees, conferences, associations, etc., to establish arbitrary and unreasonable rates to and from the State of Georgia. These conspiracies, it alleged, had eliminated substantially all rail competition. The Supreme Court held that Georgia could pursue its request for an injunction. What Georgia won in the Supreme Court, it promptly lost in Congress. The Reed-Bulwinkle Act explicitly exempts rate agreements and rate bureau accords approved by the ICC from the antitrust laws. 49 U.S.C.A. § 5b.

For our purposes, it is important to remember that the Reed-Bulwinkle Act preserves the potential of competition since individual railroad initiative is a legal requirement. If the instant merger is permitted, then that initiative will be irrevocably lost. Cf. *Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904). (This case may be viewed as advancing the proposition that a merger to soldify a conspiracy is illegal under the antitrust laws.) This Court has absolutely no doubt that, judged by the standards of the antitrust laws, the instant merger would fail at least as to Florida. But whether this merger violates the antitrust laws by eliminating competition or potential competition is not the question before us.

The relationship of section 5 of the Interstate Commerce Act and the antitrust laws has been commented on by the ICC, the district courts and the Supreme Court on a number of occasions. In *N. Y. Central Securities* v. *United States,* 287 U.S. 12 (1932), the Supreme Court dealt with the predecessor of the present act, the Transportation Act of 1920. The ICC authorized the New York Central Railroad Company to acquire control, by lease, of the railroad systems of the Cleveland, Cincinnati, Chicago & St. Louis Railway, and the Michigan Central Railroad Company. A minority stockholder of each sought to attack the ICC's order. The authority to acquire control was sought on the ground that it would facilitate revision of routes, and the physical improvements needed for new routes, and would make possible important economies in operation. The question presented was whether the control granted was in the "public interest," and whether that term was so vague as to make it an unconstitutional delegation. The Court said (287 U.S. at 24-25):

> "Appellant insists that the delegation of authority to the Commission is invalid because the stated criterion is uncertain. That criterion is the 'public interest.' It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. Going forward from a policy mainly directed to the prevention of abuses, particularly those arising from excessive or discriminatory rates, Transportation Act, 1920, was designed better to assure adequacy in transportation service. This Court, in *New England Division Case,* 261 U.S. 184, 189, 190, adverted to that purpose, which was found to be expressed in unequivocal language; 'to attain it, new rights, new obligations, new machinery were created. The Court directed attention to various provisions having this effect, and to the cri-

> teria which the statute had established in referring to 'the transportation needs of the public,' 'the necessity of enlarging transportation facilities,' and the measures which would 'best promote the service in the interest of the public and the commerce of the people.' Id. p. 189, note. See, also, *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Sante Fe Ry. Co.*, 270 U.S. 266, 277. The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. * * * *"

In view of the Supreme Court, "The public interest is served by economy and efficiency in operation." 287 U.S. 23.

In *N. Y. Central* the carriers' lines were parallel and the plaintiffs argued that the acquisition would thus eliminate competition between the carriers. The Court answered (287 U.S. at 25-26):

> "The fact that the carriers' lines are parallel and competing cannot be deemed to affect the validity of the authority conferred upon the Commission. The Congress, which had power to impose prohibition in the regulation of interstate commerce, *Northern Securities Co.* v. *United States*, 193 U.S. 197, had equal power to foster that commerce by removing prohibitions and by permitting acquisition of control where that was found to be an aid in the accomplishment of the purposes in view in the enactment of Transportation Act, 1920. See *New York* v. *United States*, 257

U.S. 591, 601; *Colorado* v. *United States,* 271 U.S. 153, 165. Exercising this paramount power, the Congress expressly provided in subdivision (8) of § 5, which has direct reference to subdivision (2), that 'the carriers affected by any order made under the foregoing provisions of this section' are 'relieved from the operation of the "antitrust laws," ' and 'of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.' The question whether the acquisition of control in the case of competing carriers will aid in preventing an injurious waste and in securing more efficient transportation service is thus committed to the judgment of the administrative agency upon the facts developed in the particular case."

The principal precedent and first case to deal with the scope of review in the context of modern antitrust law was *Associated Transport, Inc.,* 38 M.C.C. 137 (1942), injunction denied, *McLean Trucking Co.* v. *United States,* 48 F. Supp. 933 (S.D. N.Y. 1942), *aff'd,* 321 U.S. 67 (1944). The ICC authorized seven large motor carriers (originally Arrow Carrier was to be an eighth, but dropped out after the ICC approved the consolidation) to merge, forming the largest motor carrier in the United States and the only "end-to-end" motor carrier from New England to Florida.

In the course of three pages of generalized language, the ICC detailed the benefits which it believed would accrue from the merger (38 M.C.C. 143-146): 1. Consolidation would result in a higher load factor on vehicles with a concomitant reduction in the number of vehicles required for service. 2. Unified garage and testing facilities would lead to safer operation. 3. Vehicles could be shifted more readily from one end of the system to the other in order

to meet peak demands. 4. In some cities terminals could be consolidated; additional terminals could be established where before there was not enough traffic for any one of the companies to establish a terminal. 5. Relations with shippers and public regulatory bodies would be simplified. 6. Tracing of shipments and settlement of claims would be facilitated. 7. Economy would result by combining administration. The Commission concluded (38 M.C.C. 146):

> "We find: That the consolidation would result in improved transportation service, and that through movement of freight would be simplified and expedited, equipment would be more efficiently utilized, terminal facilities would be improved, the handling of shipments would be reduced, relations with shippers and public regulatory bodies would be simplified, and safe operation would be promoted."

In the present case the ICC considered the benefits more carefully than in *Associated,* but concluded that they were present, citing almost the same factors. The ICC found the following benefits: 1. Consolidation of stations and terminals. 2. Consolidation of switching facilities and elimination of yard engines and yard diesels. 3. Consolidation would result in higher load factor on freight trains between major terminals with a concomitant reduction in the number of trains required. 4. Economy would result by combining administration. 5. Unified repair shops would result in more economical and safer operation, including the reduction of stores facilities (320 I.C.C. 154-59). The Commission concluded (320 I.C.C. 160-61):

> "In addition to the specific benefits above discussed, many other benefits can reasonably be expected to result from the elimination of wasteful and duplicative facilities and an *overall* (sic) improvement in operations. These benefits can be grouped as follows. In the area of improved service, it can be anticipated that benefits will be derived from (1) more flexible

schedules and more direct routes; (2) the elimination of interchanges and delays in transit; and (3) the simplification of transit arrangements and greater flexibility in arranging stopoff points. Reduction in shipping costs can be anticipated from the elimination of wasteful and unneeded transport facilities, the substitution of single-line rates on certain commodities, and the elimination of certain switching charges. A more adequate car supply, the availability of more specialized equipment, and more efficient utilization of equipment should result. There also are a number of advantages in dealing with a single corporate entity such as convenience in the settlement of claims and the tracing of cars. Additionally, the merged company will make a significant contribution to the economic and industrial development of the Southeastern States through the promotion of new industrial sites, improvements in port terminal facilities, and in the stabilization of employment which will flow from greater financial stability of the merged company."

If it were only necessary that the Commission find what it perceived to be benefits "securing more efficient transportation service," our inquiry would be at an end. The ICC's decision is no more vague or speculative in the present case than it was in *Associated.*

One real difference between *Associated* and the instant case is in the facts surrounding the post-merger competitive picture. In their first brief, filed June 8, 1964, the United States cites *Northern Securities Co.* v. *United States,* 193 U.S. 197 (1904) and its progeny for the proposition that "elimination of competition between Seaboard and Coast Line" violates the antitrust laws and is so significant that it prevents the ICC from allowing a merger. Clearly, the Government is correct that the elimination of significant competition, as here, violates the antitrust laws. But *N.Y. Central Securities, supra,* 287 U.S. at 25, cites *Northern*

Securities to demonstrate that Congress had power to authorize the ICC to waive the antitrust laws and allow a combination that would eliminate significant competition between the parties.

Associated clearly authorizes the ICC to eliminate competition between the parties to the merger. In answering a contention by the Antitrust Division similar to that made in the present case, the ICC said (38 M.C.C. at 150):

> "Undoubtedly, *substantial competition exists between certain of the carriers involved, and consummation of the instant transactions would eliminate such competition.* However, such fact alone is not controlling. We are unable to agree with the argument of the Antitrust Division that it was the intention of Congress in enacting section 5 that we approve only such transactions as would not result in an 'unreasonable' restraint of competition within the meaning of the antitrust laws, *regardless of benefits that might result or the adequacy of remaining competition.*" (Emphasis added.)

The Commission stated its understanding of the test to be applied as follows (38 M.C.C. at 150-151):

> "In our opinion, the Congress intended to place wholly within our judgment the granting or denying of authority for these transactions under section 5. The specific reference to the antitrust laws only emphasizes the Congressional intent that we should be empowered to approve transactions which otherwise would be violative of the antitrust laws, if we are convinced that the public interest would thus be best served. Stated differently, section 5 authorizes us to permit unifications which would, except for such approval, result in restraining competition contrary to the antitrust laws, where the disadvantages of such restraint are overcome by other advantages in the public interest,

> such as direct betterment in the public service of the carriers or indirect betterment through stabilization of the industry. Determination of the larger question as to whether the proposed unification would be consistent with the public interest involves consideration not only of the competition that would be eliminated, but also of the competition that would remain, and the advantages which would result from the unification."

Therefore, the affirmance of these principles in operation by both the district court and the Supreme Court should put to rest the argument that the elimination of competition between the parties is in itself enough to prevent an ICC approved merger where sufficient outside competition remained.

Before reaching the crux of the matter, "the competition that would remain," one other issue must be dispatched. The Government argues that the present merger is different in that it involves two healthy, stable railroads and not a failing company. *Associated* involved not only seven healthy trucking companies, but probably seven of the most healthy trucking companies in the United States. The national transportation policy and the Commission have always looked at benefits going far beyond the saving of a failing company. By restricting their authority to such companies, we would allow them to approve only those mergers that do not violate the antitrust laws. So far no court has been willing to take such a position and the Supreme Court has rejected it specifically. *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944) at 85-86.

The major difference between the record in *Associated* and that in the instant case is the substantial competition that remained after the merger in *Associated.* The Commission divided the Eastern United States into three regions—New England, Middle Atlantic, and the South. The ICC then analyzed the remaining competition in each

of these regions in great detail. The Commission's analysis is subject to some criticism but it does show that substantial intramodal competition remained. The Commission concluded (38 M.C.C. at 159-160):

> "The foregoing clearly shows that, if the proposed transaction is consummated, there would remain ample competitive motorcarrier service throughout the territory involved. In addition, all of the principle points and many others are served by one or more rail carriers. Competition is also afforded by motor-vehicle contract carriers and by carloading and forwarding companies."

The ICC also recognized that trucking, unlike railroading, was an industry affording ease of entry. 38 M.C.C. at 161. It should be apparent that there are two important differences between *Associated* and the present case—ease of entry and remaining competition.

The district court in *McLean* refused to enjoin the ICC order approving the Associated merger, explaining the problem of accommodating the antitrust laws and the Interstate Commerce Act as follows (48 F. Supp. 933 (S.D. N.Y. 1942) at 936):

> "Considerable light will be thrown on this problem at once by noticing the plain fact that while the Antitrust Acts and the Interstate Commerce Act are designed to bring about the conduct of business for the common good the former are also penal and are aimed at the evils of monopolies as such which unreasonably restrain trade or business while the later, though it does not disregard such evils, is primarily concerned with creation and maintenance of adequate transportation service to the public."

The court went on to say (48 F. Supp. at 937):

> "What is needed for adequate service is a matter for the Commission to decide and it is likewise free

to decide what amount of competition is in furtherance of the public interest and what is not. It is not bound to preserve or foster competition to a degree that will not best serve the public interest from the standpoint of adequate public transportation service and whether competition as such is adequate or not must depend upon its effect in furtherance of the attainment of the ends Congress sought to accomplish under the Interstate Commerce Act administered by the Commission. * * * *

"* * * * We cannot review the weight of the evidence or the wisdom of the order."

In affirming the district court, the Supreme Court recognized that the merger would eliminate competition between the parties. *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1943) at 71.

The Supreme Court said (321 U.S. at 76):

"In passing upon a proposed consolidation the Commission is required to 'give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; * * * (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.' § 5(2)(c). The foregoing provisions supply the general statutory standards for guiding the Commission's judgment; *and within their broad limits, its authority is 'exclusive and plenary.'* § 5(11)."

In discussing the accommodations of the antitrust laws and the Interstate Commerce Act, the Court said (321 U.S. at 85):

"And in authorizing those consolidations it did not import the general policies of the antitrust laws as a measure of their permissibility. It in terms relieved

participants in appropriate mergers from the requirements of those laws. § 5(11). In doing so, it presumably took into account the fact that the business affected is subject to strict regulation and supervision, particularly with respect to rates charged the public—*an effective safeguard against the evils attending monopoly,* at which the Sherman Act is directed." (Emphasis added.)

Later the Court explained (321 U.S. at 86): "Congress recognized that the process of consolidating motor carriers would result in some diminution of competition *and might result in the creation of monopolies.*" (Emphasis added.) The Court says to "prevent the latter effect" the Commission was given "power to control such developments." One interpretation of this wording is that the Commission cannot allow monopolies to be formed. But the words are subject to a different explanation. The use of the word "effect" may mean the Commission's power to regulate monopoly power, not a prohibition of the creation of any monopolies. The Commission was given broad, plenary powers and was to look at mergers as a part of the "national" transportation problem. Thus, there could be local or limited monopolies so long as they were controlled and contributed to the attainment of the national transportation policy objectives. Therefore, a limited monopoly, such as the one in the present case, might be allowed.

The Commission is to weigh, "as an administrative matter," "the effect of the merger on competitors and on the general competitive situation in the industry." As the Supreme Court said (321 U.S. at 87):

> "Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to

> the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is consistent with the public interest.' [Cites omitted.] If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order." (Emphasis added.)

In the instant case, the Commission looked at and weighed all the factors it had examined in *Associated*. It is this weighing of factors and not the result that the statute compels.[31] The ICC considered those areas in Florida where a monopoly would be created, including the size of the cities involved and their relative importance. If we say that the Commission may do this where competition remains but not where some monopoly areas are produced, we will create an anomolous situation. Section 1 of the Sherman Act makes combinations in restraint of trade unlawful. The transactions involved in *N.Y. Central Securities, supra,* and *Associated-McLean, supra,* by restraining trade would possibly violate Section 1, and on a proper finding, as there made, the Commission could waive this violation. Section 2 of the Sherman Act makes attempts to monopolize illegal. Therefore, to strike down the Commission's action in the instant case will, in effect, say it can waive Section 1 of the Sherman Act or the more stringent Clayton Act, but not Section 2 of the Sherman Act. Nothing in the legislation admits that interpretation. Compare the situation where the ICC grants the right to

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[31] Cf. Ayrshire Corp. v. United States, 335 U.S. 573 (1949), at 592-93, quoted supra, n. 18.

extend rail service to newly-discovered phosphate deposits to one railroad but not to its competitor. *Atlantic Coast Line R.R.* v. *United States,* 243 F. Supp. 945 (E.D. Va. 1965).

At oral argument the government attempted to clarify its "failing company" proposition. Counsel explained that not all healthy competitors should be prevented from merging. It was explained that the government's position really was that where two healthy competitors are involved economies or "dollar savings and other alleged benefits, transportation, service, and such other things" should *never* be enough to overcome severe "elimination of competition," such as here involved. This argument is cogent, and if made before the Commission would doubtless be given weight.[32] It distinguishes the *Associated-McLean* case, *supra,* where substantial competition remained. But this argument cannot, as a matter of law, be used to re-write the statute.

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[32] Cf. the Commission's statement in Great Northern Pacific & Burlington Lines, Inc.—Merger—Great Northern Railway Co., I.C.C. (1966) at (F.D. No. 21478) ms. p. 90:

> "The second general observation we wish to make is that the financial strength of the applicants is not a bar to merger. Cf. Norfolk & Western Ry. Co. and New York, Chicago & St. Louis Ry. Co.-Merger, 324 I.C.C. 1 (1964). Section 5(2) of the Act is not limited to transactions involving a union of the weak and the weak, the strong and the weak or the large and the small. On the other hand, the prosperous condition of the major applicants is a highly material fact. Where carriers are so impoverished that they are unable, individually, to constantly improve their transportation services and facilities, the public interest involved in a pooling of their resources is obviously stronger than in a case where, as here, the applicants are financially able to improve their plants and facilities in step with advances in rail technology."

See also the Commission's discussion I.C.C. at , ms. pp. 96-97.

Congress has directed the ICC to give primary weight to four factors. *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1943) at 76 (quoted *supra*, p. 24). To allow the government's argument to override those statutory standards even when the Commission has carefully applied them and found the merger justified would be, as the Supreme Court said in *ICC* v. *J-T Transport Co.*, 368 U.S. 81 (1961) at 89-90, equivalent to loading the scales in favor of but one factor.

In the present case it may not be entirely accurate to refer to Seaboard and Atlantic as financially healthy railroads. The Commission found (320 I.C.C. at 149): "While the past earnings record of both Seaboard and Coast Line is impressive, their rate of return has not been significantly high. Although it is above the average norm for class I railroads, it does not compare favorably with returns on investments in other industries or in other modes of transport." The ability of railroads to earn a rate of return sufficiently high to enable them to obtain funds for needed facilities in the capital market is a subject to which Congress has specifically directed attention. Congress in 1958 passed legislation designed to make funds available to railroads by allowing the ICC to guarantee loans in the aggregate amount of 500 million dollars. 49 U.S.C.A. § 1231, et seq.[33]

In describing the significance of Congress' action, the courts have said (*Southern Railway Co.* v. *United States*, 167 F. Supp. (M.D. Ga. 1958) at 754): "The whole import of this legislation is that funds for the development of needed facilities for the railroads are not available at current interest rates or in the capital market from ordinary commercial sources." Given this background, we

[33] See 1958 U.S. Code Cong. & Admin. News, p. 3456, for the legislative history of the Transportation Act of 1958. The Commission has now guaranteed loans in the aggregate of about 225 million dollars.

must conclude that the ICC has broad discretion in determining how financially healthy railroads should be before their merger ceases to be in the public interest.

Minneapolis & St. Louis R. Co. v. *United States*, 361 U.S. 173 (1959) is of little help to the plaintiffs. That case did little more than repeat what was said in *McLean Trucking, supra.* In *Minneapolis*, the ICC had to choose between two possible mergers. The Supreme Court agreed that the ICC was correct in choosing the merger that maintained the greatest degree of competition. In the instant case there is no choice between equally advantageous mergers. If there is to be any "benefits" at all, competition must be reduced.

In our opinion, the ICC has clearly realized the danger zones in this merger and after analyzing the problem has chosen what it concludes to be more important public benefits.[34] The voluminous record amply supports its findings. The greatest problem that we have experienced is that none of the plaintiffs in this case chose to build a record before the Commission on which to support their contentions.

Before this Court the government has presented able arguments. Had these been made before the Commission and had the government availed itself of the opportunity to build a record showing the basic facts it claims could be shown, this record might be made to tell a different story.

The government intervened before the ICC on the grounds that this merger was inconsistent with the anti-

[34] "We have carefully evaluated the effects of the curtailment of competition that will result from the merger and when considered in connection with the advantages of the merger, including improved services, safer operations, and lower costs, we are convinced that the advantages of the merger far outweigh the potential disadvantages." 320 I.C.C. at 212.

trust policy of the United States. It was admitted at oral argument that out of 35 hearing days, the government managed to be represented only on 5 days. The government asked for an opportunity to have a special hearing at which it desired to produce evidence to support its contentions. The Commission granted that request and set a hearing in Washington, D. C. The government then decided not to present any evidence.

In reaching the conclusion that this merger was in the public interest, the ICC reviewed at some length the competitive growth of other modes of transportation and their impact on the rail industry. The Commission voiced the railroads' contentions as follows (320 I.C.C. at 151):

> "* * * the applicants emphasized that the railroads have not participated proportionately in the country's economic growth, and that competition from other modes of transport contribute to a large extent to the financial problems now plaguing the railroad industry."

The ICC went on to announce its policy on intermodal competition in the following terms (320 I.C.C. at 166-167):

> "While we recognize in general the desirability of preserving intramodal rail competition, it is no longer the all-important factor that it once was in the days when the railroads had a virtual monopoly in all intercity freight traffic. With the development of intense competition in recent years from other modes of transport, the preservation of intramodal rail competition has lost much of its significance in the furtherance of the overall national transportation policy. Even after the merger herein is approved, effective competition among railroads will continue in most of the major industrial centers. * * *
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> "In other regulated industries, typically gas, electric, and telephone utilities, a single company frequently serves large metropolitan areas and often even sig-

nificantly larger geographic or market areas. As public utilities are affected with a public interest and are essentially monopolistic by nature, they are subjected to strict regulation and supervision by State and Federal regulatory agencies. Under regulation, their services, as a general rule, are efficient and reasonably priced despite the absence of competition. While exact comparability does not exist between railroads and public utilities generally, it must be recognized that railroads are subject to equally stringent regulation. Moreover, as railroads have the basic economic characteristics of public utilities and are subject to regulation in the public interest at both the Federal and State levels, it is not realistic to insist that intramodal rail competition must be preserved at all places, at all times, and under all circumstances. For these reasons and weighing all the factors previously discussed, plus the further consideration that railroads today encounter increasingly strong competition from other modes of transportation, we conclude and specifically find that (1) the reduction of rail competition caused by the proposed merger will not be substantial; (2) ample competitive rail service will remain after the merger throughout most of the affected area, and (3) such reduction in competition as will result from the merger will have no appreciably injurious effect upon shippers and communities."

Thus, the ICC in an attempt to insure "adequate transportation service to the public" has focused on that phase of the transportation problem President Kennedy emphasized in his transportation message to Congress—*intermodal* competition.[35] The Commission reasoned that to

[35] 1962 U.S. Code Cong. & Admin. News, p. 4148, 108 Cong. Rec. 5509 (H. Doc. No. 384), Message of April 8, 1962; see also House Rep. No. 1922, 1958 U.S. Code Cong. & Admin. News, p. 3456, 3469-3471; 1955 Weeks Committe Report (Presidential Advisory Committee on Transport Policy and Organization).

maintain healthy railroads in the long run, it must foster competition at that level where it will have its most decisive effect. It reasoned that it could waive the antitrust laws where they prevent a rational transportation policy, and here it did waive those laws. The Commission took the position that the greatest good came from increasing competition in the Southeast as opposed to maintaining it in but a part of Florida. The plaintiffs object to these policy determinations because in their view they allow the Commission to resort to a broader statistical universe that minimizes the anticompetitive impact.

Of course, if judicial review is to have any meaning, extension of principles to meet new situations, such as the new policy on intermodal competition announced here, must be based on some minimum demonstration to the courts that the Commission has relied on relevant criteria to conclude that the new policy is in the public interest. Such a demonstration was made here. The Commission reviewed the impact of other modes of transportation on railroads. The ICC looked at the long-run needs of the different areas of the South to determine which was most important. We cannot say that based on this record a reasonable man could not reach the same conclusion which the Commission has reached.[36] Nor can we say its policy is inconsistent with the scheme of the regulatory statute. In short, nothing in the record before us indicates that

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[36] It is not our function to decide whether the Commission's conclusions as applied in this case were wise. It may be that more, not less, intramodal competition was needed in Florida. We are not at all certain that the government, had it availed itself of the opportunity provided, could not have shown how ineffective intermodal competition is in Florida. But the Commission went so far as to conclude that a monopoly in Florida was not too high a price to pay for increased intra and inter-modal competition in the southeastern part of our Nation where improved transportation is needed. This was not an unreasonable conculsion for one to reach after reading the record in this case.

the action taken by the Commission in accommodating the antitrust laws and the Interstate Commerce Act is arbitrary or capricious. That we may not have reached the same conclusion does not make the ICC wrong.[37]

Plaintiff, Florida East Coast Railway, attacked the protective provisions announced by the ICC to shield this plaintiff from the effects of the merger. Businessmen, like government agencies, talk about business in the flowing terms that generals reserve for their favorite war maneuvers. As a Nation, we find ourselves today involved in a "war in Viet Nam," a "war on poverty," a "war on ignorance," et cetera. The ICC is no exception to this masculine jargonic function. In speaking of East Coast's ability to survive any agressive tendencies of the newly-merged railroad, the Commission spoke of its "potentially strong counteroffensive weapon."

At oral argument the FEC bitterly attacked the use of such language, asserting it was devoid of any real substance and so were the protective provisions. The retaliatory language used by the Commission is expressive and to that end acceptable. In short, Southern and the FEC

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[37] See Ayrshire Corp. v. United States, 335 U.S. 573 (1949), at 592-93; United States v. Louisville & Nashville R. Co., 235 U.S. 314 (1914); Gray v. Macy, 239 F. Supp. 658 (D. Ore. 1965); Consolidated Freightways v. United States, 83 F. Supp. 811 (E.D. Wash. 1949); Assigned Car Cases, 274 U.S. 564 (1927); United States v. Trucking Co., 310 U.S. 353 (1940), at 352-54; United States v. Pierce Auto Freight Lines, 327 U.S. 515 (1946); United States v. New River Co., 265 U.S. 533 (1924); Black Ball Freight Service v. United States, 223 F. Supp. 191 (D. Idaho 1963); Cardinale Trucking Co. v. United States, 232 F. Supp. 339 (N. N.J. 1964); National Motor Freight Traffic Ass'n v. United States, 242 F. Supp. 601 (D. D.C. 1965); Willey v. United States, 245 F. Supp. 669 (E.D. Ill. 1965); Legge v. United States, 244 F. Supp. 878 (W.D. Pa. 1965); Florida East Coast Ry. Co. v. United States (I), 242 F. Supp. 14, *rev. on other grounds*, 382 U.S. 154 (1965); Atlantic Coast Line R. Co. v. United States, 243 F. Supp. 945 (E.D. Va. 1965).

would have us substitute our ability to predict future effects for that of the Commission. The ICC is far more experienced in this area than any one given court. The Commission, and not we, must tailor the protection to fit its expert prediction of the future. On this record, we are in no position to say that its careful study has led to capricious results. When not plainly unreasonable, we must leave to the agency vested with congressionally assumed expertise this type of decision.[38] The question boils down to whether the ICC acted wisely in not providing more protection. Statutorily we are not the all-wise of this field, and, while our crystal ball might indicate a different result than that of the Commission,[39] the record in this case supports its action.

The Commission determined that subsequent to the merger Mercantile-Safe Deposit and Trust Company[40] would have "power to control the merged company." 320 I.C.C. at 197. In reaching this ultimate conclusion the Commission detailed the relationship between Merchantile, Coast Line Company, the Louisville & Nashville Railroad, and the merging carriers. 320 I.C.C. at 142, 193-97.

By a combination of direct and indirect stock control, Mercantile will have control over the largest single block

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[38] See n. 37, *supra*.

[39] The Commission concluded (320 I.C.C. at 188):

"It is important to note that the conditions we have devised represent neither mere acceptance of the minimum concessions offered by the applicants nor full acquiescence in the demands of the intervening railroads, but rather are the product of our exhaustive study of the competitive situation in the Southeast. We are convinced that these routing and gateway conditions will establish two balanced competitive systems in that area and will result in an increase rather than decrease in intramodal rail competition that will contribute to the present and future economic development of this important section of the Nation."

[40] Hereafter Mercantile.

of stock in the merged company. The Commission's primary factual findings are supported by substantial evidence in this record. Its ultimate conclusion that control will result is a reasonable one, well within the province of its statutory power.

The Commission also concluded that (320 I.C.C. at 197):

> "Merchantile is an investment company engaged exclusively in the banking and trust business. Its direct interest in the merged company is merely incidental to its primary business of managing trusts and estates."

Section 5(3) permits the ICC "to the extent" it deems appropriate to designate a person who is not actually a carrier as a carrier for the purpose of the Interstate Commerce Act, if such person is authorized to acquire control of an actual carrier in a transaction approved under section 5(2). Under section 5(3) it is clear that the ICC need not designate every person obtaining such control as a carrier. *United States* v. *Marshall Transport Co.*, 322 U.S. 31, 41; *Wellsville A.&G. Corp., Purchase and Control*, 295 I.C.C. 115, 129.

Under the "circumstances" of the instant case, the Commission decided not to exercise its section 5(3) power. The Commission's primary factual findings as to the character of Merchantile's activities are supported by substantial evidence in this record. We see no abuse of discretion in the Commission's ultimate conclusion based on those primary facts.

The Commission noted that the merger will have substantial adverse effects upon many railroad employees and their families, but in the long run the merger will provide greater job security and more stabilized conditions of employment for employees of the merged company. See 320 I.C.C. at 200. Approximately 4,257 jobs will be abolished and the location of employment will be changed

for 4,439 other employees. 320 I.C.C. at 154. One of the four primary criteria to which section 5(2)(c) directs the ICC's examination is "the interest of the carrier employees affected" by the merger.

In our first opinion, since we remanded the case to the ICC for further proceedings, we did not find it appropriate to reach the question of employee protection. The policy adopted by Congress clearly contemplated that the accomplishment of economies and improved transportation through consolidation of the Nation's rail carriers will have an impact upon rail employees. In section 5(2)(f), Congress provided for the protection of employees by the Commission. No merger may be approved that does not provide for "a fair and equitable arrangement to protect the interests of the railroad employees affected." Moreover, Congress provided that the Commission must insure "that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers • • • being in a worse position with respect to their employment."

The intervening plaintiff, Railway Labor Executives' Association,[41] bitterly attacks as inadequate the protective conditions adopted by the ICC. In the instant case the Commission adopted the protective conditions it announced in *Southern Railway Co.-Control-Central of Georgia Ry. Co.*, 317 I.C.C. 557, 729, 320 I.C.C. 377. The Association paints a sorry picture of confusion and utter chaos which it claims shrouds the *Southern Railway* conditions.

The Association points out that the *Southern Railway* conditions were imposed in a "control" case and argues that they cannot rationally be applied in a consolidation case. This contention is without merit. The problem created by acquisition of control or merger from the standpoint of affected employees is identical. This fact is

[41] Hereafter Association.

amply demonstrated by the expected problem discussed by the district court which reviewed the *Southern Railway* conditions. That court commented (*Railway Labor Executives Ass'n* v. *United States*, 226 F. Supp. 521 (E.D. Va. 1964) at 522, vacated on other ground, 379 U.S. 199 (1964)):

> "The Commission, in approving the transaction, was fully advised of the proposed consolidation of Central's freight agencies, yards, shops and accounting department into those of Southern, together with the resultant job losses entailing substantial hardship to many employees and their families. In the alleviation of these hardships the Commission imposed conditions for the protection of the employees thus affected, which it determined more than met the statutory requirements of Section 5(a)(f) and would be fair and equitable."

The major argument of the Association is that the *Southern Railway* conditions are confusing and inadequate. The *Southern Railway* conditions codify the labor conditions previously employed by the Commission and are intended to provide a shorthand means of referring to those conditions when cited in cases such as the present merger. The basic employee protection conditions may be traced to the ICC's 1941 decision in *Texas & P. Ry. Co. Operation*, 247 I.C.C. 285. That decision set forth conditions to protect affected employees who were displaced or dismissed during the four-year period following the effective date of the Commission's order.

In *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177 (1944) at 199-201, the ICC refined the protection contained in the *Texas & P.* conditions. Employees receiving the *Oklahoma* conditions were, in addition to the *Texas & P.* conditions, allowed moving expenses and losses on the sale of homes. The *Southern Railway* conditions in

Article I carry forward the *Oklahoma* conditions as the Commission's basic four-year protective provisions.

In the *New Orleans Union Passenger Terminal* case, 282 I.C.C. 271 (1952), the Commission went a step further and extended financial compensation beyond the four-year period provided in the *Oklahoma* conditions. These protections are carried forward in Article II of the *Southern Railway* conditioons. Thus, employees who are first affected during the first five years [42] after the effective date of the Commission's order are protoected until they obtain the full benefits of what is called the Washington Agreement. [43] Moreover, the *Southern Railway* conditions provide a stronger arbitration provision than did earlier provisions.

The Association seems to place a strained interpretation on the Commission's action. After reading the ICC's decision in this case and reviewing the background of the *Southern Railway* conditions, we do not think the Association's interpretation should prevail. Nor do we think there is merit in the argument that the Association never

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[42] This was conceded by the ICC's General Counsel at oral argument when he said: "In other words, we say that the employees first affected in the fifth year after the effective date of the Commission's Order get the same Washington agreement protection that they would have obtained under the New Orleans conditions. Nothing has been taken away from such an employee." (R. p. 143.)

[43] The "Washington Agreement," or the "Agreement of May 1936, Washington, D. C.," as it is sometimes called, is an agreement that was entered into by virtually all the railroads and railroad unions in the United States. This collective bargaining agreement provides some protection to employees affected by "coordinations" of facilities between two or more carriers. The Supreme Court ordered the Commission to clarify the relationship of the Southern Railway Conditions and the Washington Agreement in Railway Labor Executives' Association v. United States, 379 U.S. 199 (1964).

had an opportunity to argue against the *Southern Railway* conditions.

The Association had ample opportunity to argue for conditions it thought appropriate, and did in fact argue for an attrition clause. We must realize that the Commission's citation of the *Southern Railway* conditions is just a shorthand method of saying that, after consideration of all arguments, it applies the same conditions here as in *Southern*.

Some confusion may be engendered by the fact that the Virginia court [44] construed the *Southern Railway* conditions more narrowly than the Commission later said it had intended. The Commission has now abandoned any contention that it only went as far as the Virginia court thought, and we should not be confused by that interchange of occurrences. Read carefully and applied rationally, the use of the *Southern Railway* conditions in this case need cause no confusion.

After carefully examining the contentions of *Railway Labor Executives' Ass'n*, the Commission concluded (320 I.C.C. at 201):

> "We are unable to conclude that conditions requiring the retention of unnecessary employees in unnecessary positions [or the equivalent alternatives suggested by the Association] would be consistent with the public interest or sound business policy. The imposition of such conditions would unduly restrict carriers in the establishment of more economical operations, and would be in conflict with the objectives of the national transportation policy."

Based on the record in this case, we cannot say that the Commission's action has created inequitable or unfair labor

[44] Railway Labor Executives' Ass'n v. United States, 226 F. Supp. 521 (E.D. Va. 1964), *vacated in part*, 379 U.S. 199 (1964).

conditions. What was said in *Brotherhood of Maint. of Way Employees* v. *United States*, 221 F. Supp. 19 (E.D. Mich. 1963) at 29, *aff'd*, 375 U.S. 216 (1963), is applicable here:

> "It is recognized that even though there will be some immediate hurt to railroad employees in the approval of mergers and affiliations, railroad employees, as well as all other members of the public, will, in the long run, find more and better opportunities if the country's total economic health is protected. We cannot say that the conditions imposed by the Commission do not adequately protect the rights of the employees in this situation."

The Association also argues that the ICC misconstrued its statutory authority in one important respect. As the Association reads the words "employees of the carrier or carriers by railroad affected," the statute requires the Commission to protect not only the employees of the merging roads but also the employees of their competitors who may be affected.

The Commission has consistently construed this language as only requiring protection for the employees of carriers involved or participating in the transaction. This consistent practice lends weight to what seems the logical interpretation of the statute. Taken in context, the provision is but one of many dealing with the Commission's treatment of merger applicants. When Congress spoke of "carriers" in section 5(2), it referred to the participants. For example, in section 5(2)(a)(i) the statute required ICC approval for "two or more carriers to consolidate or merge." In section 5(2)(c) the statute speaks of the "interest of the carrier employees affected," obviously meaning participating carrier. And when Congress wished to refer to nonparticipating carriers in 5(2)(d), it said "another railroad or other railroads."

Taken in context, we think it clear that the "carrier or carriers" referred to in section 5(2)(f) are the carriers involved in the merger and most immediately affected by the Commission's action. We, therefore, hold that the statutory protection requirement is restricted to the carriers involved in the transaction.

We conclude that in formulating employee protection the Commission has not transcended its statutory bounds. Based on the record in this case, we also conclude that the Commission in approving this merger has not failed to "give weight to" "the interests of the carrier employees."

After considering the arguments which we have discussed and all other arguments in this case, we conclude that the ICC explained its reasoning and supported its application of that reasoning by substantial evidence. Since the ICC correctly applied the proper standards and thus exhibited that familiarity with the complex problems in the transportation industry which Congress anticipated the ICC would achieve from its particularized experience, we must and do sustain its order. The injunction prayed for is therefore denied.

Judge Simpson concurs in the result.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

SEABOARD AIR LINE R. CO.

v.

UNITED STATES;

and

INTERSTATE COMMERCE COMMISSION

v.

FLORIDA EAST COAST RAILWAY CO.

Appeals from the United States District Court for The Middle District of Florida.

Nos. 425 and 555 Decided November 22, 1965

PER CURIAM.

Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Company filed with the Interstate Commerce Commission an application for authority to merge. In the administrative proceedings, the applicants contended that the merger would enable them to lower operating costs, improve service, and eliminate duplicate facilities; other carriers opposed the merger on the ground that it would have adverse competitive effects; and the Department of Justice contended that the merger would create a rail monopoly in central and western Florida.

The Commission approved the merger, subject to routing and gateway conditions to protect competing railroads. It recognized that the merger would eliminate competition and create a rail monopoly in parts of Florida. But it found that the merged lines carried only a small part of the total traffic in the area involved; that ample rail competition would remain therein; and that the reduction in competition would "have no appreciably

injurious effect upon shippers and communities." In addition, the Commission noted that the need to preserve intramodal rail competition had diminished, due to the fact that railroads were increasingly losing traffic to truck, water, and other modes of competition.

The three-judge District Court set aside the order and remanded the case to the Commission for further proceedings. It concluded that the Commission's analysis of the competitive effects of the merger was fatally defective because the Commission had not determined whether the merger violated § 7 of the Clayton Act by reference to the relevant product and geographic markets. By thus disposing of the case, the District Court did not reach the ultimate question whether the merger would be consistent with the public interest despite the foreseeable injury to competition.*

We believe that the District Court erred in its interpretation of the directions this Court set forth in *McLean Trucking Co.* v. *United States*, 321 U. S. 67 (1945), and *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173 (1959). As we said in *Minneapolis* at 186:

> "Although § 5(11) does not authorize the Commission to 'ignore' the antitrust laws, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80, there can be 'little doubt that the Commission is not to measure proposals for [acquisitions] by the standard of the antitrust laws.' 321 U.S., at 85-86. The problem is one of accommodation of § 5 (2) and the antitrust legislation. The Commission remains obligated to 'estimate the scope and appraise the effects of the curtailment of competition which will result from

* It expressly declined to consider two further issues, *i.e.*, whether the Commission's labor protection conditions were adequate and whether control of the merged company by the Mercantile-Safe Deposit and Trust Company would be consistent with the public interest.

> the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquistion] will assist in effectuating the overall transportation policy.' " 321 U.S., at 87

The same criteria should be applied here to the proposed merger. It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be "consistent with the public interest." 54 Stat. 908, 49 U.S.C. § 5 (2)(b) (1964 ed.).

Whether the Commission has confined itself within the statutory limits upon its discretion and has based its findings on substantial evidence are questions for the trial court in the first instance, *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 578 (1952), and we indicate no opinion on the same. We therefore vacate the judgment of the District Court and remand the case to it for a full review of the administrative order and findings pursuant to the standards enunciated by this Court.

Vacated and remanded.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 64-64-Civ. J.

FLORIDA EAST COAST RAILWAY COMPANY, a corporation, Florida East Coast Building, St. Augustine, Florida,
PLAINTIFF

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

(Filed May 13, 1965, Jacksonville, Fla.)

Before RIVES, *Circuit Judge*, and SIMPSON and MCRAE, *District Judges*.

Opinion

RIVES, *Circuit Judge:*

This is an action to enjoin, annul, and set aside orders of the Interstate Commerce Commission[1] which, subject to routing and gateway conditions and employee protective conditions, authorize the merger of the Atlantic Coast Line Railroad Company into Seaboard Aid Line Railroad Company and the related acquisition of control by Seaboard of carriers subsidiary to or affiliated with Atlantic Coast Line, most prominently including Louisville and Nashville Railroad Company. Florida East Coast Railway Company brought the action against the United States and the Interstate Commerce Commission.[2] Since the Attorney General, representing the United States,[3] opposes the merger, the United States has been realigned as a party plaintiff.

[1] See 49 U.S.C. § 17(9); 28 U.S.C. § 2321.

[2] See 28 U.S.C. §§ 2322, 2323; 49 U.S.C. § 17(9).

[3] See 28 U.S.C. § 2323.

Jurisdiction of this court is provided by 28 U.S.C. § 1336, and a district court of three judges has been convened as required by 28 U.S.C. § 2325.

Plaintiff Florida East Coast Railway Company, a Florida corporation, has its principal office at Saint Augustine, Saint Johns County, Florida, which is in the Middle District of Florida. Hence venue is properly laid in the Middle District. See 28 U.S.C. § 1398.

The Railway Labor Executives' Association, the Southern Railway Company, and its affiliated companies in the Southern Railway System intervened as parties plaintiff. The Mercantile-Safe Deposit and Trust Company, the Seaboard Air Line Railroad Company, the Atlantic Coast Line Railroad Company and The Atlantic Coast Line Company intervened as parties defendant in support of the challenged orders of the Commission.

Florida East Coast's motion for an order restraining temporarily the operation and effective date of the orders of the Interstate Commerce Commission, pending the final hearing and determination of the action, see 28 U.S.C. § 2324, was granted by the Honorable Bryan Simpson, Chief Judge, United States District Court for the Middle District of Florida, based on the specific finding that irreparable damage would result to the plaintiffs if the temporary restraining order was not granted. See 28 U.S.C. §§ 2284(3), 2325.

The Commission stated that the merger it approves[4] would result in the elimination of present competition between Seaboard and Atlantic Coast Line in a six-state area.[5] In the six-state area and in an eight-state area,[6]

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[4] Commissioner Webb, with whom Commissioner Tucker joined, dissented.

[5] The six states are Alabama, Florida, Georgia, North Carolina, South Carolina and Virginia.

[6] The additional states are Tennessee and Kentucky.

the merged company would control more than 54 per cent of the total railroad mileage, while the Southern Railway Company, its nearest competitor, would have about 34 per cent. The merged company would have approximately 81 per cent of the railway mileage in Florida. See *Seaboard Air Line R.R.*, 320 I.C.C. 122, 163 (1963). Approximately 4,257 jobs would be abolished and the location of employment would be changed for 4,439 other employees, 320 I.C.C. at 154. The Commission found that: the reduction of rail competition caused by the proposed merger will not be substantial; ample competitive rail service will remain after the merger throughout most of the affected area; and the reduction in competition that will result from the merger will have no appreciable injurious effect upon shippers and communities. 320 I.C.C. at 167. The Commission noted that the merger will have substantial adverse effects upon many railroad employees and their families, but, in the long run, the merger would provide greater job security and more stabilized conditions of employment for employees of the merged company. See 320 I.C.C. at 200. Both Seaboard Air Line and Atlantic Coast Line are currently in healthy financial condition.

The questions raised in this three-judge district court action deal with the protective conditions for employees and with the relationship between section 5(2)[7] of the Interstate Commerce Act—which authorizes the Commission to approve proposed mergers that are found to be in the "public interest"[8]—and the antitrust laws, more specifically section 7 of the Clayton Act.[9]

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[7] 49 U.S.C. § 5(2).

[8] 49 U.S.C. § 5(2)(b); see *e.g.*, Phillips, Railroad Mergers: Competition, Monopoly, and Antitrust, 19 Wash. & Lee L. Rev. 1, 9 (1962).

[9] 15 U.S.C. § 18.

Plaintiff Florida East Coast suggests that the ultimate importance of this case is that the Commission has written preservation of competition and prevention of monopoly out of the concept of "public interest."

Section 5(2)(c) of the Interstate Commerce Act, which sets forth the certain factors which must be considered by the Commission in passing upon any proposed railroad merger or affiliation, does not expressly require that the Commission consider the antitrust laws as a factor in the public interest. The Commission is required by section 5(2)(c) to

> "give weight to the following considerations, *among others:* (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." [10]

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[10] 49 U.S.C. § 5(2)(c). (Emphasis added.) The Act of Sept. 18, 1940, ch. 722, tit. I § 1, 54 Stat. 899, which amended the Interstate Commerce Act, set forth the "National Transportation Policy":

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of develop-

However, the Commission has long been required "to give weight to the antitrust policy of the nation before approving mergers and consolidations."[11] The antitrust laws are expressly considered in section 5(11) of the Act which exempts carriers and individuals participating in an approved merger

> "from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved ... , and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transactions."[12]

The Commission has been required to accommodate section 5(2) and the antitrust legislation due to the presence of the section 5(11) exemption[13] and the history of the development of the national transportation policy.[14]

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ing coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. *All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.*"

49 U.S.C.A. (Historical note following table of contents). (Emphasis supplied.)

[11] Georgia v. Pennsylvania R.R., 1945, 324 U.S. 439, 456.

[12] McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 76-77; 49 U.S.C. § 5 (11). In cases of affiliation of a motor carrier with a railroad, the Commission cannot approve the merger "unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." 49 U.S.C. § 5(2)(b).

[13] Minneapolis & St. L. R.R. v. United States, 1959, 361 U.S. 173, 186.

[14] McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 79.

In giving weight to antitrust policy as a factor in the "public interest," plaintiff Florida East Coast contends that the Commission must define the "line of commerce" (relevant product, or services, market) and "section of the country" (relevant geographical market) in which to appraise the probable competitive effects of the proposed merger and must determine whether the effect of the merger "may be substantially to lessen competition" or "tend to create a monopoly."[15]

On its face this contention may seem contrary to the Supreme Court's decision in *McLean Trucking Co.* v. *United States*.[16] *McLean* involved the Commission's approval of the consolidation of seven large motor carriers. The most

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[15] Section 7 of the Clayton Act provides in part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.
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> . . . . . .
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> "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . Interstate Commerce Commission . . . ."

15 U.S.C. § 18.

[16] 321 U.S. 67 (1944).

important effect of the merger was to create an end-to-end consolidation from points in the far South to New England, with obviously large possibilities for through service.[17] The order approving the consolidation was attacked on the ground that the merger, notwithstanding Commission approval, violated the Sherman Act[18] and, hence, the Commission had no power to approve the merger. The Court decided that the Commission is not required to decide definitively whether the transaction violated the Sherman Act, but that the Commission's role is to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all trasnportation policy."[19] However, *McLean* does not dispose of the plaintiff's contention. Basic to the Court's determination in that case was the holding that the Commission has no jurisdiction to enforce the proscriptions of the Sherman Act. The Court stated:

> "To secure the continuous, close and informal supervision which enforcement of legislative mandates frequently requires, Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. Thus here, *the Commission has no power to enforce the Sherman Act as such. It cannot decide stitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act.* The Commission's task

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[17] See *id.* at 71.

[18] See 15 U.S.C. §§ 1-3.

[19] *Id.* at 87.

> is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action."

321 U.S. at 79-80 (Emphasis supplied.) In sharp constrast to the Commission's lack of jurisdiction to enforce the Sherman Act, Congress by section 11 of the Clayton Act has entrusted the Commission with authority to enforce compliance with section 7 and other Clayton Act provisions "where applicable to common carriers" under the Commission's jurisdiction.[20] While "the Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems," the Clayton Act legislation constitutes an additional "frame of reference within which the Commission operates."[21]

We think *Minneapolis & St. L. Ry.* v. *United States*,[22] a decision more recent than *McLean*, recognizes that the Commission's estimate of the scope and appraisal of the effects of any curtailment of competition which might result from a merger is to be initially and properly approached in terms of whether the effect is "substantially to lessen competition, or to tend to create a monopoly." In *Minneapolis* the Commission found that a proposed railroad acquisition "would not result in any significant [much less substantial] lessening of competition."[23] Its determination was said to rest upon "adequate findings."[24]

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[20] 15 U.S.C. § 21. See Georgia v. Pennsylvania R. R., 1945, 324 U.S. 439, 456 and n. 9.

[21] See McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 79-80.

[22] 361 U.S. 173 (1959).

[23] *Id.* at 188, 189.

[24] *Id.* at 189.

There is an additional reason why the Commission is required to decide whether or not section 7 of the Clayton Act would be violated by the proposed merger. It would seem that the Commission is required to "give weight" to antitrust policy in section 5(2) proceeding only if the merger has the probable anticompetitive effect proscribed by section 7 of the Clayton Act. More specifically, when the effect of a proposed merger "may be substantially to lessen competition" or "to tend to create a monopoly," "in any line of commerce in any section of the country," the prohibition of the Clayton Act must be given weight. Conversely, when the proposed merger would not so result, the Commission is not required to give weight to antitrust policy. The Commission impliedly recognizes such a principle in its finding in the present case that the reduction of rail competition caused by the proposed merger will not be substantial. 320 I.C.C. 167.

Furthermore, it has long been settled that "immunity from the antitrust laws is not lightly implied."[25] When an agency, such as the Interstate Commerce Commission, is entrusted by Congress with authority to require compliance with section 7 of the Clayton Act,[26] and also to grant relief from the operation of the antitrust laws,[27] the logical corollary would be that the Commission will not grant immunity from the antitrust laws unless clearly authorized by the law and required by the evidence.

For that policy to have any real substance the Commission is required to determine whether or not the effect of the proposed merger "may be substantially to lessen competition" or "to tend to create a monopoly," "in any line of commerce in any section of the country." That does not

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[25] See, *e.g.*, *United States v. Philadelphia Nat'l Bank*, 1963, 374 U.S. 321, 348.

[26] 15 U.S.C. § 21.

[27] 49 U.S.C. § 5(11).

mean that the Commission may authorize only those acquisitions which would not offend section 7 of the Clayton Act.[28] The Commission with propriety may approve a rail consolidation, otherwise prohibited by the antitrust laws, in order to bring about needed or desirable improvement in service and economies in operation.[29] In other words, if the Commission finds that the policy of the Transportation Act would be thwarted unless a particular type of merger or consolidation were permitted, it would be authorized to approve the merger or consolidation, although the transaction would otherwise violate section 7 of the Clayton Act.[30]

Concomitant to the Commission's determination of whether the effect of the merger "may be substantially to lessen competition" or "tend to create a monopoly," the Commission must define the area of effective competition by reference to a product, or service market (the "line of commerce") and a geographic market (the "section of the country").[31]

We note that in *Minneapolis & St. L. Ry., supra,* which considered both the Sherman Act and section 7 of the Clayton Act, the Supreme Court did not expressly direct the Commission to define the relevant market by delineating a service market and a geographical market. However, that case was decided prior to *Brown Shoe Co.* v. *United States,* 1962, 370 U.S. 294. *Brown Shoe* was the first case to consider the background of the 1950 amendments to section 7 of the Clayton Act. In *Brown Shoe,* the Supreme Court set forth directions for measuring the rele-

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[28] See Minneapolis & St. L. Ry. v. United States, 1959, 361 U.S. 173, 187.

[29] See McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 78.

[30] See *id.* at 94 (dissenting opinion).

[31] See Brown Shoe Co. v. United States, 1962, 370 U.S. 294, 324.

vant market within which the anticompetitive effects of a merger are to be judged.[32]

There is an additional reason for requiring the Commission to determine the product market and the geographic locus of competition. The Commission imposed routing and gateway conditions for the benefit of the intervening railroads to offset possible diversion of traffic by the merged company. It noted that "absent suitable protective conditions and consideration of these factors [the public advantage that will accrue from the merger], there is a distinct possibility that the proposed transaction would tend to lessen competition to an extent which would contravene the policy underlying the antitrust laws."[33] We think it clear as the Commission has recognized, that routing and gateway conditions bear a distinct relationship to the possible anticompetitive effects of the merger. Moreover, we do not think routing and gateway conditions can be meaningful in terms of the "public interest" as affected by the Clayton Act unless they are imposed by reference to the product market and the geographic market. The Commission's primary concern is the "public interest,"

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[32] Although Minneapolis & St. L. Ry. was decided in 1959, it is clear that only section 7 of the Clayton Act as enacted in 1914 was involved in that case and dealt with by the Court. See 361 U.S. at 185 & n. 11. The Court stated that "section 5(11) is both a more recent and a more specific expression of congressional policy than § 1 of the Sherman Act and § 7 of the Clayton Act . . . ." 361 U.S. at 186. However, the 1950 amendment to the section 7 of the Clayton Act is later in time than either section 5(11) or section 5(2) of the Interstate Commerce Act. Compare 15 U.S.C.A. § 18 (Historical note), with 49 U.S.C.A. § 5(2) (Historical note) and 49 U.S.C.A. § 5(11) (Historical note).

[33] 320 I.C.C. at 167. Compare 320 I.C.C. at 188. "We are convinced that these routing and gateway conditions will establish two balanced competitive systems in that area and will result in an increase rather than decrease in intramodal rail competition that will contribute to the present and future economic development of this important section of the Nation."

not "private interest." To impose routing and gateway conditions outside the context of the relevant markets either fails to employ Clayton Act standards as relevant to the public interest or assumes that private interest is consistently compatible with the public interest.

Therefore, we hold that the Commission must define the "line of commerce" and "section of the country" in which to appraise the probable competitive effects of the proposed merger and must determine whether the effect of the merger "may be substantially to lessen competition" or "tend to create a monopoly." The reason the Commission must make such findings is, most precisely, the fact that antitrust policy, to be given any effect whatsoever, must be measured in terms of criteria that have been developed by Congress and the courts.[34] If an erroneous statutory construction lies hidden in vague or insufficient findings then important statutory prerequisites to merger may be overlooked.[35]

Applying that holding to the present case, we conclude that the Commission has failed to make sufficient findings to accommodate section 5(2) of the Interstate Commerce Act with section 7 of the Clayton Act.

The Commission's conclusion concerning the anticompetitive effects of the proposed merger is reflected in its following statement:

> "Except in portions of Florida, the over-all reduction in rail competition in the Southeastern States will be relatively moderate and inconsequential when viewed

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[34] In a recent article Professor Handler and Mr. Robinson have noted that "whatever the guidelines for ascertaining whether a merger may have the proscribed anticompetitive effects, they are not in the legislative text and must inevitably be defined by the highest court." Handler & Robinson, *The Supreme Court v. Corporate Mergers*, Fortune, January, 1965.

[35] See United States v. Carolina Carriers Corp., 1942, 315 U.S. 475, 489.

> in the light of the alternative rail service that will be provided by competitors of the merged company at most of the major industrial centers in the affected area. With few exceptions, vigorous rail competition will continue to flourish in the territory served by the merged company. The impact of any lessening of rail competition that might result from this merger will be minimized by the increasingly strong competition that the merged company will encounter from other modes of transportation."

320 I.C.C. at 211, 212. The Commission noted that Tampa and the central and western portions of Florida are served by no other railroads except Seaboard and Atlantic Coast Line. It recognized that the merger would supplant the duopoly with a rail monopoly. 320 I.C.C. at 164-165. The Commission's conclusion that the reduction of rail competition caused by the proposed merger would not be substantial, 320 I.C.C. at 167, was determined by reference to rail competition in the Southeastern States as a whole.[36] Furthermore, the Commission noted the growth in motor and water transportation service in recent years in Tampa and the surrounding area. See 320 I.C.C. at 152-53. And its conclusion that the reduction in competition that will result from the merger will have no appreciable injurious effect upon shippers and communities, 320 I.C.C. at 167,

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[36] The Supreme Court has noted that "if anticompetitive effects of a merger are probable in 'any' significant market, the merger—at least to that extent—is proscribed . . . .[by section 7]. To illustrate: If two retailers, one operating primarily in the eastern half of the Nation, and the other operating largely in the West, competed in but two mid-Western cities, the fact that the latter outlets represented but a small share of each company's business would not immunize the merger [under section 7] in those markets in which competition might be adversely affected. On the other hand, that fact would, of course, be properly considered in determining the equitable relief to be decreed." Brown Shoe Co. v. United States, 1962, 370 U.S. 294, 337 & n. 65.

was apparently by reference to other modes of transportation—motor carriers, air carriers, water carriers and pipelines—operating in the Southeastern States.

It may be that the relevant geographical market is the Southeastern States as a whole. But the proper question to be asked in determining the appropriate "section of the country" is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate."[37] The geographic market selected must both correspond to the commercial realities of the industry and be economically significant. Although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area.[38]

It may be that the relevant service market includes modes of transportation other than railroads. But the fact that other modes of transportation operate within the geographic area or areas, within which the anticompetitive effects of a merger are to be judged, is not determinative of the relevant service market. Similarly, reference to tonnage and dollar aggregates to show the decline of railroad transportation and rise of other modes of transportation, and such statistics as the number of truck registration in an area, are not, in themselves, determinative. The outer boundaries of a service market are to be determined by the reasonable interchangeability of use or the cross-elasticity of demand between the service itself and substitutes for it. It should be noted, however, that within this broad market, well-defined submarkets may exist, which in themselves constitute service markets for anti-

[37] United States v. Philadelphia Nat'l Bank, 1963, 374 U.S. 321, 357.

[38] See Brown Shoe Co. v. United States, 1962, 370 U.S. 294, 336-37.

trust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the service's peculiar characteristics and uses, unique service facilities, distinct customers, distinct prices and sensitivity to price changes.[39]

The United States, acting through the Attorney General, requests that the merger of Seaboard Air Line and Atlantic Coast Line be *permanently* enjoined. While a three-judge district court has power to enjoin the *orders* of the Commission authorizing a merger, we doubt if such a court has the power to permanently enjoin the *merger*. See 28 U.S.C. § 2321. Furthermore, the three-judge district court is limited to determining whether the Commission made any errors of law, whether its action was arbitrary, capricious, or an abuse of its discretion, and, upon review of the whole record, whether its findings of fact are supported by substantial evidence.[40] The United States' request that this Court permanently enjoin the merger would require that the Court go beyond the present record. We would have to find that upon no set of facts which the applicants might present could the merger be found to be in the "public interest." For this Court to enjoin permanently the merger would require that we invade the long-established province of the Commission. Resolving such considerations is a complex task which requires extensive facilities, expert judgment and con-

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[39] See *id.* at 325. Thus it may be that railroads constitute at least a submarket for the transportation of heavy-loading, low value bulk commodities due to cost and service advantages available to railroads.

Just as a service submarket may have section 7 significance as the proper "line of commerce," so may a geographic submarket be considered the appropriate "section of the country." See *id.* at 336.

[40] See Brotherhood of Maintenance of Way Employees v. United States, 221 F. Supp. 19, 24, *aff'd mem.*, 375 U.S. 216 (1963).

siderable knowledge of the transportation industry. The wisdom and experience of the Commission, not of the courts, must determine whether the proposed consolidation is "consistent with the public interest."[41] The United States' request for a permanent injunction against the merger is accordingly denied.

Intervening-plaintiff Railway Labor Executives' Association contends that the terms and conditions imposed by the Commission to protect the interests of the railroad employees affected are inadequate and violate section 5(2)(c)(4)[42] and section 5(2)(f)[43] of the Interstate Commerce Act and are unsupported by adequate, clear, and precise findings. The Association requests that the orders

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[41] McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 87-88.

[42] "In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others : . . . (4) the interest of the carrier employees affected." 49 U.S.C. § 5(2)(c)(4).

[43] "As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." 49 U.S.C. § 5(2)(f).

of the Commission should be declared invalid on these grounds. The Association's request, as its brief recognizes, is based on the assumption that the Commission's orders authorizing the merger are otherwise approved. Since the Commission's orders must be enjoined for the reasons discussed above, consideration of the Association's contentions would be premature at this time.

The Commission found that under the merger plan the Mercantile-Safe Deposit and Trust Company will acquire power to control the merged company. It would be premature at this time for this Court to pass upon the question of whether Mercantile's power of control would be consistent with the public interest without requiring it to be considered as a carrier under section 5(3)[44] of the Interstate Commerce Act.

The orders of the Interstate Commerce Commission served December 13, 1963 and March 6, 1964 authorizing a merger of the properties and franchises of Atlantic Coast Line Railroad Company into Seaboard Air Line Railroad Company will be anulled and set aside and the enforcement of said orders enjoined, all without prejudice to further proceedings before and further findings and orders by the Commisison not inconsistent with this opinion.

This the 13th day of May 1965.

/s/ Richard T. Rives
RICHARD T. RIVES
United States Circuit Judge

/s/ Bryan Simpson
BRYAN SIMPSON
United States District Judge

/s/ William A. McRae, Jr.
WILLIAM A. McRAE, JR.
United States District Judge

[44] 49 U.S.C. §5(3).

APPENDIX D

STATUTES INVOLVED

Interstate Commerce Act

Section 5(2)(b), 49 U.S.C. § 5(2)(b)

Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use

service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Section 5(2)(c), 49 U.S.C. § 5(2)(c)

In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Section 5(2)(d), 49 U.S.C. § 5(2)(d)

The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

Section 5(11), 49 U.S.C. § 5(11)

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of

such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

The National Transportation Policy

54 Stat. 899, Sept. 10, 1940, 49 U.S.C. notes preceding Sections 1, 301, 901, and 1001

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and

maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Clayton Antitrust Act

Section 7, 15 U.S.C. § 18

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immedate lawful busness, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

Section 11, 15 U.S.C. § 21

(a) Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board, where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

Issuance of complaints for violations; hearing; intervention; filing of testimony; report; cease and desist orders; reopening and alteration of reports or orders

(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a

notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may at any time, after notice and opportunity for hearing, reopen and

alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Review of orders; jurisdiction; filing of petition and record of proceeding; conclusiveness of findings; additional evidence; modification of findings; finality of judgment and decree

(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the commission or board, and thereupon the commission or board shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the commis-

sion or board as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order of the commission or board is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission or board. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

Exclusive jurisdiction of Court of Appeals

(d) Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission or board shall be exclusive.

Preference; liability under antitrust laws

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust laws.

Service of complaints, orders and other processes

(f) Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (1) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (2) by leaving a copy thereof at the residence or the principal office or place of business of such person; or (3) by mailing by registered or certified mail a copy thereof addressed to such person at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered or certified mail as aforesaid shall be proof of the service of the same.

Finality of orders generally

(g) Any order issued under subsection (b) of this section shall become final—

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission or board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b) of this section; or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the commission or board has been affirmed, or the petition for review has been dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) upon the denial of a petition for certiorari, if the order of the commission or board has been affirmed or

the petition for review has been dismissed by the court of appeals; or

(4) upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the commission or board be affirmed or the petition for review be dismissed.

Finality of orders modified by Supreme Court

(h) If the Supreme Court directs that the order of the commission or board be modified or set aside, the order of the commission or board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the commission or board shall become final when so corrected.

Finaltiy of orders modified by Court of Appeals

(i) If the order of the commission or board is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission or board rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the commission or board was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the commission or board shall become final when so corrected.

Finality of orders issued on rehearing ordered by Court of Appeals or Supreme Court

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the commission or board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission or board rendered upon such rehearing shall become final in the same manner as though no prior order of the commission or board had been rendered.

Definition of mandate

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalties

(l) Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense.

APPENDIX E

Order

At a Session of the
INTERSTATE COMMERCE COMMISSION
held at its office in Washington, D. C.,
on the 2nd day of December A.D. 1963.

Fiance Docket No. 21215

SEABOARD AIRLINE RAILROAD COMPANY—
MERGER—ATLANTIC COAST LINE RAILROAD
COMPANY

Finance Docket No. 21254

ATLANTIC COAST LINE RAILROAD
COMPANY BONDS

Investigation of the matters and things involved in these proceedings having been made, a hearing having been held, oral argument having been heard, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report and the report of the hearing examiner is hereby referred to and made a part hereof:

It is ordered, That the motions of several interveners that the application be dismissed, be, and they are hereby, denied;

It is further ordered, That the petition of Florida East Coast Railway Company for further hearing be, and it is hereby denied;

It is further ordered, That subject to the terms, conditions and modifications referred to in the aforesaid report,

(a) the merger of the properties and franchises of the Atlantic Coast Line Railroad Company into the Seaboard Air Line Railroad Company (name to be changed to Seaboard Coast Line Railroad Company) for ownership, management and operation; (b) the acquisition by the latter of sole or joint control of carriers subsidiary to or affiliated with the Atlantic Coast Line Railroad

[2]

Company through ownership of stock or lease; (c) the acquisition by the Seaboard Air Line Railroad Company, as successor in interest, of trackage rights and joint use of certain lines of railroad now used by the Atlantic Coast Line Railroad Company; (d) the transfer of the outstanding motor carrier operating rights of Atlantic Coast Line Railroad Company to the Seaboard Air Line Railroad Company pursuant to the approved plan of merger; and (e) by virtue of such merger, the acquistion of control of Seaboard Air Line Railroad Company, the surviving corporation, by Atlantic Coast Line Company and in turn, the acquistion of indirect control of Seaboard Air Line Railroad Company by Mercantile-Safe Deposit and Trust Company, be, and they are hereby, approved and authorized.

It is further ordered, That (a) the issuance by Seaboard Air Line Railroad Company of 3,839,345 shares of $20 per share par value common stock and script certificates representing fractional shares in conversion of outstanding capital stock of the Atlantic Coast Line Railroad Company pursuant to the aforesaid plan of merger, and (b) the assumption by the said Seaboard Air Line Railroad Company of the obligations and liabilities of the Atlantic Coast Line Railroad Company existing on the date of the merger, including obligations of companies subsidiary to or affiliated with the latter, which are contingently guaranteed either

solely by Atlantic Coast Line Railroad Company, or jointly with other guarantors, upon the terms and for the purposes described, be, and they are hereby, authorized;

It is further ordered, That (a) the proposed Modification Indenture of the Atlantic Coast Line Railroad Company to the First, Second, Third and Fifth Supplemental Indentures, dated March 1, 1950, June 30, 1952, July 1, 1952, and March 1, 1955, respectively to its General Mortgage dated March 1, 1950, modifying the sinking fund requirements with respect to its Bonds of Series A, B, C and D, in the manner and form set forth in the application filed in Finance Docket No. 21254 and in the proposed Modification Indenture, all as described in the aforesaid report, be, and

[3]

it is hereby, authorized, contingent upon and concurrent with the consummation of the merger herein authorized, and (b) the Commission's Orders of May 26, 1950, in Finance Docket No. 16961; April 10, 1952, in Finance Docket No. 17667; June 23, 1952 ,in Finance Docket 17791; and March 25, 1955, in Finance Docket No. 18874 be, and they are hereby, modified accordingly;

It is further ordered, That, except as herein authorized, the aforesaid securities shall not be sold, pledged, repledged or otherwise disposed of by Seaboard Air Line Railroad Company, or by the Atlantic Coast Line Railroad Company, or by the merged company, unless or until so ordered or approved by the Commission;

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said securities or dividends thereon on the part of the United States;

It is further ordered, That the merged company shall report concerning the matters involved herein in conform-

ity with the orders of the Commission, Division 4, dated August 9, 1946, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 56.4 and 56.6);

It is further ordered, That the merged company, when establishing changes in tariffs, rates and charges as may be required in effectuation of transactions approved herein may do so upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and shall in schedules making such changes refer to this order by date and docket number;

It is further ordered, That if the authority herein granted is exercised, the merged company shall submit for the consideration and approval of the Commission three copies of the journal entries required to record the transactions authorized herein;

[4]

It is further ordered, That this certificate and order shall become effective from and after 30 days from the date of service;

And it is further ordered, That, if the authority granted in the certificate herein is not exercised within one year from the effective date of this order, it shall be of no further force and effect.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)

APPENDIX F

Service Date
March 6, 1964

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of March A.D. 1964.

Finance Docket No. 21215

SEABOARD AIR LINE RAILROAD COMPANY—
MERGER—
ATLANTIC COAST LINE RAILROAD COMPANY

Finance Docket No. 21254

ATLANTIC COAST LINE RAILROAD
COMPANY BONDS

Upon consideration of the record in the above-entitled proceeding, of the petitions, filed January 13, 1964, on behalf of (a) Union Bag-Camp Paper Corporation, (b) Florida East Coast Railway Company, (c) Gulf, Mobile and Ohio Railroad Campany, (d) Illinois Central Railroad Company (including request for oral argument), (e) Central of Georgia Railway Company and Savannah & Atlanta Railway Company, (f) Southern Railway Company et al., and (g) Railway Labor Executives' Association, for reconsideration of the report and order of December 2, 1963; and of the reply of applicants, filed February 3, 1964; and

It appearing, That the employee-protective conditions set forth in *Southern Ry. Co.—Control—Central of Georgia*

Ry. Co., 317 I.C.C. 557, as supplemented in 317 I.C.C. 729, were imposed herein; that on February 27, 1964, the said conditions were clarified; and that such conditions as clarified are, and continue to be, applicable to this proceeding;

It further appearing, That, subject to certain restrictions, the Southern Railway Company operates over a line of the Atlantic Coast Line Railroad Company between Hardeeville, S.C., and Jacksonville, Fla., via Savannah, Ga., under trackage agreements with the said Atlantic Coast Line Railroad Company; that the said trackage agreements, as interpreted by the parties thereto, may preclude the Southern Railway Company from interchanging freight traffic at Savannah with either Central of Georgia Railway Company or the Savannah & Atlanta Railway Company in connection with movements to, from, or through the Jacksonville gateway;

It further appearing, That Condition 8, relating to the opening of the Jacksonville gateway by the merged company should be clarified and modified to require the Seaboard-Coast Line Railroad Company to provide the Central of Georgia Railway Company, the Savannah & Atlanta Railway Company and other affiliates and subsidiaries of the Southern Railway Company with the right to interchange freight traffic with the Southern Railway Company at Savannah in connection with movements to, from or through the Jacksonville gateway via the Hardeeville-Jacksonville segment;

And it further appearing, That, except as the petitions are granted for the purpose of the modification herein approved, the material matters set forth in the petitions have been considered by the Commission and discussed in its report, that the decision is based on adequate findings supported by the record, that there has been presented no error of fact or law with respect to the matters complained of by petitioners, that no showing has been made war-

ranting reconsideration of the said decision, and that further oral argument is unnecessary:

[2]

It is ordered, That the proceeding be, and it is hereby, reopened for reconsideration solely for the purpose of modifying Condition No. 8 of the routing and gateway conditions; and that the said condition be, and it is hereby, modified as follows:

Condition No. 8, after the word "gateway" at the end of Condition No. 8, delete period, insert comma in lieu of period, and add the following:

and, *Provided further* that the Seaboard Coast Line Railroad Company shall take such further action as may be necessary to permit the interchange of freight traffic between Southern Railway Company and Central of Georgia Railway Company, Savannah & Atlanta Railway Company and other affiliates and subsidiaries of the Southern at Savannah in connection with movements to, from, or through the Jacksonville gateway by the Southern Railway Company under existing trackage arrangements permitting operations by that rail carrier between Hardeeville and Jacksonville over a line of the Seaboard Coast Line Railroad Company.

It is further ordered, That in all other respects the said petitions be, and they are hereby, denied.

And it is further ordered, That the order of December 2, 1963, as herein modified, shall become effective from and after 35 days from the date of service.

By the Commission.

HAROLD D. MCCOY
Secretary

(SEAL)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. _____

CITY OF TAMPA, FLORIDA,

Appellant

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA JACKSONVILLE DIVISION

JURISDICTIONAL STATEMENT

The City of Tampa, Florida, appellant, appeals from the judgment of a three-judge United States District Court of the Middle District of Florida, Jacksonville Division, entered June 8, 1966, which reversed its former position and denied plaintiffs' prayer for an injunction and sustained the orders of the Interstate Commerce Commission authorizing the merger of the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad Company. In compliance with Rules 13 and 15 of this Court, the City of Tampa submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that the questions presented are substantial.

OPINIONS BELOW

The opinion of the three-judge District Court entered June 8, 1966 is not yet reported. Copies of that opinion and of the judgment of the District Court of the same date are printed as Appendix A (pp. 2a - 50a and p. 1a, respectively) of the Jurisdictional Statement of the Florida East Coast Railway Company.[1] The previous opinion of this Court, 382 U. S. 154, is printed as Appendix B (pp. 51a - 53a). The first opinion of the three-judge District Court entered May 13, 1965, which is reported at 242 F. Supp. 14, is printed as Appendix C (pp. 54a - 70a). The report of the Interstate Commerce Commission, dated December 2, 1963, is printed at 320 I. C. C. 122; the opinion of the dissenting Commissioners is printed at 320 I.C.C. 214. Copies of the Commissioners' opinions have been provided separately for the convenience of the Court.

JURISDICTION

Florida East Coast Railway Company brought suit in the United States District Court for the Middle District of Florida to set aside an order of the Interstate Commerce Commission. A three-judge District Court was convened pursuant to Title 28, United States Code, Section 2325. The Railway Labor Executives Association, The Southern Railway Company and its affiliated companies in The Southern Railway System, and the Attorney General, representing the United States, opposed the merger and intervened or were realigned as parties-plaintiff. Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, The Atlantic Coast Line Company, and Mercantile-Safe Deposit and Trust Company intervened as parties-defendant.

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[1] Herein all references to appendices refer to those of the October 1966 Jurisdictional Statement of appellant Florida East Coast Railway Company.

The first judgment of the District Court, which set aside the Commission's orders, was entered May 13, 1965. Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, The Atlantic Coast Line Company, The Mercantile-Safe Deposit and Trust Company filed their notices of appeal to the United States Supreme Court in the District Court June 9, 1965; the Interstate Commerce Commission filed its notice of appeal in that court July 12, 1965. Thereafter, this Court vacated the three-judge District Court's judgment and remanded "for a full review of the administrative order and findings." *Seaboard Air Line R. R. v. United States,* 382 U. S. 154, 157 (1965).

Upon remand, the three-judge District Court granted the City of Tampa's petition to intervene as party-plaintiff. The second judgment of the District Court, which sustained the Commission's orders, was entered June 8, 1966, and the City of Tampa filed its notice of appeal August 8, 1966. The jurisdiction of this Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253.

The following decisions, among others, sustain the jurisdiction of this Court to review the judgment of the three-judge District Court on direct appeal: *Minneapolis & St. Louis Ry. v. United States,* 361 U. S. 173 (1959); *McLean Trucking Co. v. United States,* 321 U. S. 67 (1944).

STATUTES INVOLVED

Sections 5(2)(b), 5(2)(c), 5(2)(d) and 5(11) of the Interstate Commerce Act, 49 U.S.C. §§ 5(2)(b), 5(2)(c), 5(2)(d) and 5(11); the National Transportation Policy, 49 U.S.C. note preceding Section 1; and Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18 and 21; are set forth in Appendix D (pp. 71a - 73a, 73a - 74a and 74a - 82a, respectively).

QUESTIONS PRESENTED

The three-judge District Court, upon remand from this Court, has reversed its former position and sustained the orders of the Interstate Commerce Commission authorizing the merger of the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad Company.

The questions presented are:

(1) whether the Commission, in determining that the merger would be consistent with the public interest despite the foreseeable injury to competition, applied proper legal standards for accommodating Section 5(2) of the Interstate Commerce Act with the antitrust legislation and rested its conclusion on adequate findings based on substantial evidence;

(2) whether the Commission utilized proper legal standards and made adequate findings estimating the scope and appraising the effects of the curtailment of competition, as required by *McLean Trucking Co. v. United States*, 321 U. S. 67 (1944), particularly with regard to the transportation monopoly which will be created by the merger in central and western Florida in the transportation of heavy, long-haul, bulk-loading commodities which account for some 77% of the business of the two merging railroads;

(3) whether the Commission could properly determine, on the present record, that the anti-competitive and monopolistic effects of this merger were outweighed by its asserted advantages so as to support a conclusion that the transaction would be consistent with the public interest;

(4) whether the Commission fulfilled its obligation to compile an adequate record concerning the anti-competitive effects of the merger, and whether the court below erred in considering that this obligation rested wholly on the parties before the Commission.

STATEMENT

On July 22, 1960, the Seaboard Air Line Railroad Company (hereafter called "Seaboard"), the Atlantic Coast Line Railroad Company (hereafter called "Coast Line"), and The Atlantic Coast Line Company filed a joint application with the Interstate Commerce Commission (hereafter called "Commission") for authority under Section 5(2) of the Interstate Commerce Act [2] to merge the properties and franchises of the Coast Line, including its motor carrier operating rights and its interest in subsidiary and affiliated railroads, into the Seaboard. On the same day, Seaboard applied to the Commission for authority to assume the liabilities and obligations of Coast Line and for authority under Section 20a of the Interstate Commerce Act [3] to issue additional common stock, which was to be issued to the shareholders of Coast Line. Pursuant to the merger plan Seaboard, the surviving corporation, is to be renamed the Seaboard Coast Line Railroad Company.

The Commission conducted hearings in several cities between November 1960 and July 1961. With two Commissioners dissenting, it issued its report dated December 2, 1963, approving the merger, subject to certain conditions.

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[2] 49 U.S.C. § 5(2).

[3] 49 U.S.C. § 20a.

The Florida East Coast Railway Company brought this action in the United States District Court for the Middle District of Florida to enjoin, annul and set aside the orders of the Commission. By its judgment dated May 13, 1965, [4] that three-judge District Court set aside those orders, without prejudice to further proceedings before or further findings and orders by the Commission.

The District Court set aside the Commission's orders because it had not made sufficient findings to disclose an accommodation of the nation's transportation policies and its antitrust policies. It recognized that Congress had entrusted to the Commission authority to approve a railroad merger prohibited by the national antitrust policy if it found the national transportation policy would be otherwise thwarted. But it said that, as a concomitant of such obligation to thus accommodate the nation's antitrust policies and its transportation policies, "the Commission must define the area of effective competition by reference to a product or service market . . . and a geographic market . . . ." [5] The District Court noted that meaningful judicial review would be otherwise impossible, saying:

> "The reason the Commission must make such findings is, most precisely, the fact that antitrust policy, to be given any effect whatsoever, must be measured in terms of criteria that have been developed by Congress and the courts. If an erroneous statutory construction lies hidden in vague or insufficient findings then important statutory prerequisites to merger may be overlooked." [6]

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[4] Appendix A at 1a.

[5] *Florida East Coast Ry. v. United States*, 242 F. Supp. 14, 21 (M.D. Fla. 1965); Appendix C at 63a.

[6] 242 F. Supp. at 22; Appendix C at 65a.

Applying this holding to the instant case, the District Court concluded, "the Commission has failed to make sufficient findings to accommodate section 5(2) of the Interstate Commerce Act with section 7 of the Clayton Act." [7]

The merger applicants appealed that decision to this Court. They urged this Court to fully review the question whether, in analyzing the anti-competitive effects of a proposed railroad merger as a step in its appraisal of the public interest under Interstate Commerce Act § 5(2), the Interstate Commerce Commission was required to determine whether the merger violated the standards of Section 7 of the Clayton Act. [8] In responding to the applicants' jurisdictional statement, the Department of Justice agreed with the District Court that the Commission's findings were inadequate [9] but

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[7] 242 F. Supp. at 22; Appendix C at 65a.

[8] Jurisdictional Statement for Appellants, pp. 4-5, *Seaboard Air Line R.R. v. United States*, 382 U.S. 154 (1965).

[9] Memorandum for the United States, *Seaboard Air Line R.R. v. United States*, *supra*, at 4-5 ("[W]e do not contend that the Commission's analysis of competitive effects was adequate. The Department of Justice urged below that, tested by proper criteria, the Commission's findings in this case were *not* adequate and would renew that contention on a remand.") and at 9 ("We stress our complete agreement with the district court that the Commission is not free to make a perfunctory or superficial analysis of competition in a merger case; that it must apply standards grounded not only in its expert knowledge of railroad conditions but also in sound economic principles and the policy underlying the antitrust laws; and that exacting judicial review of the Commission's competitive findings is required. But we think the Commission can best be held to high standards in this area by careful and meticulous judicial scrutiny of the adequacy of its findings, rather than by compelling it . . . to act the precise role of a Section 7 court.").

urged that the District Court's holding set the standard for the Commission's findings too low; [10] it contended that "the practical effect of the district court's ruling could, in many cases, be to mask the actual anticompetitive effects of railroad mergers." Accordingly, the Department urged this Court to return the case to the District Court with directions "to make a fresh review of the adequacy of the Commission's findings without applying the erroneous standard of its first decision."[12]

In its *per curiam* opinion, this Court emphasized the Commission's obligation in this case to:

> " 'estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the overall transportation policy.' " [13]

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[10] Memorandum for the United States, *supra*, at 7-8: "[T]he requirement that the Commission make a Section 7 finding misconceives the Commission's function in a rail merger case and might well aggravate the very danger that it is intended to avert—the danger of deficient appraisal by the Commission of the competitive effects of a merger subject to its approval power. . . . [T]he ultimate finding required in a Section 7 case (*i.e.*, whether the effect of the challenged merger may be substantially to lessen competition in any market) tells little about the magnitude or scope of the adverse competitive consequences of the merger, save only to say that they are sufficient to invoke the bar of the statute. Such a conclusory finding is not very helpful to an agency required to balance a lessening of competition against other public-interest factors in passing on a merger; it is not sufficiently refined for the agency's balancing task. What the agency needs to know in order to perform its statutory function properly is not whether the merger has the anticompetitive effects prescribed by Section 7 but how substantial and widespread those effects are."

[11] *Id.* at 9.

[12] Memorandum for the United States, *supra*, at 10.

[13] *Seaboard Air Line R.R. v. United States*, 382 U.S. 154, 156 (1965); Appendix B at 52a-53a.

It observed, again, that the Commission has the power "to approve the merger of railroads if it makes adequate findings in accordance with [these] . . . criteria . . . that such a merger would be 'consistent with the public interest.'" [14] Noting that the District Court had not reached "the ultimate question whether the merger would be consistent with the public interest despite the foreseeable injury to competition" and two other issues, this Court did vacate the judgment of the District Court and remanded the case to the District Court "for a full review of the administrative order and findings pursuant to the standards enunciated by this Court." [15]

On remand the District Court decided it had been implicitly overruled in its holding that the Commission's analysis of the merger's anti-competitive effects was inadequate. It reasoned that, because the Commission had "perceived the danger areas" in this merger and made a minimal showing to the courts that it was in the public interest, and because the Commission's action was not "arbitrary or capricious", the District Court was required to sustain the Commission's order. [16]

THE QUESTIONS ARE SUBSTANTIAL

1. A recitation of some of the salient economic facts about this merger illustrates the importance of the questions this case presents for plenary review.

The City of Tampa is the hub of central and west Florida. This area contains more than 40% of Florida's population; it is growing at a rate faster than Florida as a whole, which state in turn is growing faster than the six-state southeastern area as a whole and

[14] 382 U.S. at 157; Appendix B at 53a.
[15] 382 U.S. at 157; Appendix B at 52a-53a.
[16] Appendix A at 50a.

faster than the United States as a whole.[17] This area produces three-fourths of the nation's phosphate rock,[18] and approximately one-fifth of the world's production of that mineral.[19]

Coast Line and Seaboard are the largest railroads in Florida. Together they operate 81% of the total rail mileage in Florida.[20]

Coast Line and Seaboard are the only railroads operating throughout Tampa's market area, central and west Florida; no other railroad serves it.[21] Seaboard and Coast Line actively compete to carry commodities over their respective interlacing networks of routes through this area. Because the commodities carried are mostly heavy-loading, bulk-haul, low-value commodities, the traffic involved in these movements is predominantly rail traffic.[22] There are fifty-nine communities in the area which will have no rail competition after the proposed merger.[23] The freight volume and dollar revenue to these two railroads from traffic originating and terminating at these points far exceeds the volume and revenue derived from all similar points in the Southeast combined.[24]

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[17] Exhibit H-155, parts 1 and 2; Transcript 3509, 3509.

[18] Exhibit H-155, *supra*, at 67.

[19] Transcript 2218.

[20] 320 I.C.C. at 163.

[21] Appendix A at 21a-22a; 320 I.C.C. at 164.

[22] Appendix A at 20a.

[23] 320 I.C.C. at 164.

[24] Computed from figures in the Report and Recommended Order of Interstate Commerce Commission Examiner, *Seaboard Air Line Railroad Company-Merger-Atlantic Coast Line Railroad Company, Finance Docket No. 21215* at 70-71.

The phosphate produced in this area is the principal commodity carried and major source of revenue to both Seaboard and Coast Line. [25] It is by far the single most important commodity to the maintenance, development and growth of Tampa's port. During 1960 nearly 15 million tons of cargo moved through the Port of Tampa. [26] The applicants' exhibits show that during 1960 they independently terminated approximately 9 million tons of freight in the Tampa area with revenue in excess of $15 million and originated in excess of 2 million tons in Tampa with revenue in excess of $6 million. [27] It is precisely on this traffic that the monopoly created by the merger will have its greatest impact. Thus, the anti-competitive effects of this merger will be most severely felt in the City of Tampa's market area, central and western Florida. [28]

Coast Line operates more than 5,000 miles of track and is now the second largest railroad in the six-state area of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia. Seaboard operates more than 4,000 miles of track and is now the third largest railroad in this six-state area. The merged company, which would operate in not only the six-state area but also in Tennessee and Kentucky, would operate over 16,000 miles of rail or approximately (54%) of the total rail mileage in this eight-state area. [29] The combination of these railroads would result

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[25] Exhibit H-38; Transcript 585, 1424.

[26] Transcript 2130.

[27] Exhibit H-252 (Transcript 5079, 5095), Statement A, sheets 1 and 2 shows 5,670,039 tons terminated. Exhibit H-268 (Transcript 5407), Statement BW includes water-rail movements and reports a total of more than 9 million tons. These exhibits do not list all commodities and do not include less-than-carload traffic.

[28] Appendix A at 21a-24a.

[29] 320 I.C.C. at 163.

in a company with assets of over $1 billion, annual operating revenues of some $340 million a year and combined net income of about $32 million annually. [30] Under any standard the merged company would be the largest single railroad system in the Southeast.

2. This Court should fully review this significant case because the District Court let the Commission's orders stand in spite of the Commission's failure to make adequate findings on the important antitrust issues and in spite of the Commission's failure to compile an adequate record.

The Administrative Procedue Act required the Commission to make intelligible findings defining the geographic market areas and the product market areas and appraising the scope and effect the proposed merger would have on competition in those markets. [31] As this Court once stated succinctly, the Commission is obligated to "articulate [the] . . . rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States,* 371 U. S. 156, 168 (1962).

Whether the Commission's order is based on adequate findings regarding the anti-competitive effects of the proposed merger is an essential inquiry in the judicial review of this case. In *McLean Trucking Co. v. United States,* 321 U. S. 67 (1944) this Court said the

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[30] 320 I.C.C. at 146-49, 253-65.

[31] Administrative Procedure Act §8(b), 5 U.S.C. § 1007(b) provides:

> "All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

Commission's order would be sustained if *"its findings are adequate* and supported by evidence," 321 U. S. at 88 (emphasis added). In *Minneapolis & St. Louis Ry. v. United States,* 361 U. S. 173 (1959) this Court sustained the Commission's order because it *"rests upon adequate findings* which are, in turn, supported by substantial evidence," 361 U. S. at 189 (emphasis added). In its *per curiam* opinion in the instant case this Court stated, again, that the Commission had the power to approve a merger *"if it makes adequate findings* in accordance with the criteria quoted above that such a merger would be 'consistent with the public interest' "; and so it instructed the District Court on remand to fully review "the administrative order *and findings,"* 382 U. S. at 157 (emphasis added). But nowhere in its second opinion did the District Court hold that the Commission's *findings* on this aspect of the case were adequate.[33]

The City of Tampa contends the Commission was obligated to (1) intelligibly circumscribe the geographic areas and sub-areas wherein the proposed merger will affect competition for the carriage of passengers and various commodities; (2) for each geographical area and sub-area so circumscribed delineate (a) the modes of transport competing therein and (b) the passengers and various commodities important therein and (c) for

[33] The District Court said, *e.g.,* "the Commission saw . . . [that the merger would create a monopoly in parts of Florida]"; and that the Commission had "exhibited that familiarity with the complex problems in the transportation industry which Congress anticipated the ICC would achieve from its particularized experienced." Appendix A at 23a, 50a. The City of Tampa contends these statements are inadequate to constitute a holding that the Commission's *findings* are adequate and contends they express an erroneous standard for judicial review of Commission orders. See, *e.g., ICC v. J-T Transport Co.,* 368 U.S. 81 (1961).

which commodities or types of commodity each mode successfully competes; and (3) articulate its estimate of the scope and appraisal of the effects on "competition" which will result from the proposed merger. In this way, appellant contends, the Commission's order would reveal its accommodation of the nation's antitrust policies and its transportation policies and fulfill the requirements of the Administrative Procedure Act.

Until it was remanded to the District Court, there was a dispute concerning the applicability to this case of the "relevant market concepts" used in antitrust law. But upon remand the Commission conceded in its brief "that Florida and more particularly the central and western portions of that state comprise . . . a separate, relevant geographic market or sub-market." [33] By this concession, the Commission expressly acknowledged that the City of Tampa's market area is a relevant, geographic area to be considered, and implicitly acknowledged its obligation to intelligibly circumscribe all the important geographic market areas and sub-areas wherein the proposed merger will affect competition for the carriage of various commodities.

The Commission's findings obviously do not fulfill these obligations. So upon remand the Commission's argument changed from whether it was obligated to define relevant geographic markets, to whether or not the Commission had made adequate findings concerning the anti-competitive effects of the proposed merger in the one admittedly relevant geographic market and sub-market—Florida, and central and western Florida. [34]

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[33] Supplemental Brief of the Interstate Commerce Commission, p. 15, *Florida East Coast Ry. v. United States*, Civil No. 64-64-Civ J, M.D. Fla. June 8, 1966.

[34] Significantly absent from the Commission's findings is a finding that there are not other geographic markets worthy of separate consideration.

The Commission's counsel argued from carefully selected portions of the record, and not from any findings of the Commission, "what the record shows" concerning the proposed merger's effect on competition for carriage of the various commodities important in these areas. By thus basing its argument on "what the record shows" and not on its findings, the Commission has tacitly admitted it failed to make adequate findings which articulate its appraisal of the proposed merger's effect on competition in the relevant geographic areas.[35]

Further, it is apparent that the Commission failed to make findings which articulate its appraisal of the of the proposed merger's effect on competition for carriage of the bulk commodities important in even the one admittedly significant geographic market, central and western Florida.[36] For example, there is no finding as to

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[35] *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962) ("the courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . ."); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[The Commission's] action must be measured by what the Commission did, not by what it might have done . . . . [Its] action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order . . . . [T]here must be such a responsible finding.")

[36] Nine commodities constitute approximately 75% of Coast Line's and Seaboard's carload tonnage and approximately 45% of their carload freight revenues. During 1959 these commodities ranked in this order:

Coast Line	Seaboard
Phosphate rock	Phosphate rock
Stone and rock, etc.	Stone and rock, etc.
Pulpwood	Pulpwood
Gravel and sand	Bituminous coal
Bituminous coal	Gravel and sand
Fertilizers, N.O.S.	Fertilizers, N.O.S.
Cement: natural and portland	Cement: natural and portland
Products of agriculture, N.O.S.	Paperboard, etc.
Paperboard, etc.	Clay and bentonite

Report and Recommended Order of Interstate Commerce Commission Examiner, *Seaboard Air Line Railroad Company-Merger-Atlantic Coast Line Railroad Company, Finance Docket No. 21215*, p. 7.

the amount of competition (in tonnage or revenue terms) for each or all of the nine principal commodities carried by Coast Line and Seaboard; no finding as to the relationship between such competition and the applicants' total traffic; no finding as to how much of the traffic for each or all of these commodities is generated in central and western Florida (or in any other significant geographic market); no finding as to the nature and effectiveness of the existing competition between the applicants for carriage of each or all of the commodities; and no finding as to the susceptibility of each or all of the nine principal commodities to intermodal competition. In fact, of these nine principal commodities, which account for approximately three-fourths of their combined tonnage, the Commission discussed only phosphate rock, and as to that commodity it made two contradictory findings. [37]

The Commission did not fulfill its obligation to make adequate findings partly because the administrative hearing record it compiled does not even contain the data from which it could validly deduce all the relevant geographic and product markets and sub-markets, much less evaluate the proposed merger's effect on competition within those markets. In its second opinion the District Court mentioned often that the record in this case is an insufficient predicate upon which to estimate the scope and appraise the effects of the curtailment of competition which would result from the proposed merger.[38] But the District Court did not consider whe-

[37] *Compare* 320 I.C.C. at 151 (phosphate rock is "essentially a commodity normally handled by rail") *with* 320 I.C.C. at 153 ("The competition faced by the railroads from other modes of transport in the Tampa area is most apparent with respect to the movement of phosphate rock.")

[38] *E.g.*, Appendix A at 19a-20a, 20a-21a, footnote 30, 38a-39a, footnote 36.

ther the case should be remanded to the Commission with instructions to develop an adequate record. Instead it erroneously put the blame for the incomplete factual record on those opposing the merger.[39]

The burden of presenting evidence concerning the proposed merger's effect on competition rested with the applicants.[40] But the Commission itself, as the statutory representative of the public interest, is obliged to develop an adequate record. It was error for the District Court, which found repeatedly that the Commission had not discharged its public responsibility, not to remand the case to the Commission for that purpose. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *Isbrandtsen Co. v. United States*, 96 F. Supp. 883 (S.D. N.Y. 1951).

3. The effective administration of judicial business suggests that plenary review by this Court of the questions presented by this case would be timely.

In its second opinion the District Court noted the two most recent decisions of this Court concerning the Commission's reconciliation of the nation's transportation policies with the competition favored by the nation's antitrust policies, *viz.*, *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944) and *Minneapolis & St. Louis Ry v. United States*, 361 U. S. 173 (1959). In order to dispose of the antitrust issues presented in

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[39] Appendix A at 38a: "The greatest problem that we have experienced is that none of the plaintiffs in this case chose to build a record before the Commission on which to support their contentions. . . . [H]ad the government availed itself of the opportunity to build a record showing the basic facts it claims could be shown, this record might be made to tell a different story."

[40] Administrative Procedure Act § 7(c), 5 U.S.C. § 1006(c).

McLean, a trucking industry case where substantial intramodal competition would exist after the proposed merger, this Court needed to decide only that the antitrust laws had to be accommodated by the Commission with the transportation laws. In order to dispose of the antitrust issues presented in *Minneapolis*, a railroad industry case in which several competing railroads each sought to acquire control of the Toledo, Peoria & Western Railroad, this Court affirmed the Commission's choice of that merger of railroads which maintained the greatest amount of intramodal competition. The instant case now presents this question: how must the Commission accommodate the antitrust laws with the transportation laws where the choice is either merger at the expense of competition or no merger to preserve competition.

Finally, as the United States' Memorandum in the prior appeal phrased it, the present case involves "a proposed merger of great magnitude and far-reaching implications for the future structure of the railroad industry . . . ."[41] It is the first of the current railroad merger proposals to reach this Court. Other rail unification proposals are pending in various stages before the courts and Commission. The antitrust questions inhering in these other pending railroad mergers emphasize the need for this Court to consider and to decide the standards to be applied when appraising the anticompetitive effects of these proposed mergers.

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[41] Memorandum for the United States, pp. 6-7, *Seaboard Air Line R.R. v. United States*, 382 U.S. 154 (1965).

CONCLUSION

This appeal presents a question of substantial importance and probable jurisdiction should be noted.

Respectfully submitted,

WM. REECE SMITH, JR.
City Attorney
First National Bank Building
Tampa, Florida, 33601

and

OWEN RICE, JR.
Post Office Box 3239
Tampa, Florida, 33601

Attorneys for Appellant,
City of Tampa, Florida

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

RAILWAY LABOR EXECUTIVES' ASSOCIATION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Appellants,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

On Appeal From the United States District Court for the Middle District of Florida, Jacksonville Division

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JURISDICTIONAL STATEMENT

EDWARD J. HICKEY, JR.
JAMES L. HIGHSAW, JR.
WILLIAM G. MAHONEY
WILLIAM J. HICKEY
620 Tower Building
Washington, D. C. 20005
Attorneys for Appellants

Of Counsel:

MULHOLLAND, HICKEY & LYMAN
620 Tower Building
Washington, D. C. 20005

October 6, 1966

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

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No.

RAILWAY LABOR EXECUTIVES' ASSOCIATION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Appellants,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

On Appeal From the United States District Court for the Middle District of Florida, Jacksonville Division

---

JURISDICTIONAL STATEMENT

The Railway Labor Executives' Association and the Brotherhood of Locomotive Engineers appeal from the judgment of the United States District Court for the Middle District of Florida, Jacksonville Division, entered on June 8, 1966 (R. 3185), denying the prayer of the appellants to enjoin, annul, suspend, and

set aside orders of the Interstate Commerce Commission, dated December 2, 1963 and March 4, 1964, and submit this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court for the Middle District of Florida, Jacksonville Division, is not yet reported. Its opinion and judgment are reproduced as Appendix A to the Jurisdictional Statement filed in No. 638 by appellant Florida East Coast Railway Company (to which reference herein will be made as follows; "FEC App. p. 1a", etc.). The report and order of the Interstate Commerce Commission, dated December 2, 1963, is reported at 320 Interstate Commerce Commission Reports 122. The order of the Commission, dated March 4, 1964, is not reported and is reproduced as Appendix A hereto, *infra*, page 1a.

JURISDICTION

This suit was brought under Title 28 of the United States Code, Sections 1336 and 1337 (28 U.S.C.A., Sections 1336 and 1337), to enjoin, annul, suspend, and set aside orders of the Interstate Commerce Commission (R. 436). The judgment of the District Court was entered on June 8, 1966 (R. 3185), and Notice of Appeal was filed in that Court on August 8, 1966 (R. 3220). The jurisdiction of this Court to review the decision below by direct appeal is conferred by Title 28 of the United States Code, Sections 1253 and 2101(b). The following cases establish the jurisdiction of this Court to review the judgment on direct appeal here involved. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156; *United States* v. *Drum*, 368 U.S. 370.

QUESTIONS PRESENTED

This appeal presents the following questions:

1. Did the Interstate Commerce Commission misinterpret and misapply Section 5(2)(f) of the Interstate Commerce Act when it refused, in approving the merger of the Seaboard Air Line Railroad and the Atlantic Coast Line Railroad, to provide protection to employees of the Florida East Coast Railway, the Central of Georgia Railway, and the Southern Railway who will be adversely affected by such merger?

2. Did the Interstate Commerce Commission misinterpret and misapply Section 5(2)(f) of the Interstate Commerce Act when it refused, in approving the merger of the Seaboard Air Line Railroad and the Atlantic Coast Line Railroad, to provide protection to employees of the applicants, who will be adversely affected by coordinations undertaken pursuant to such approval during the fifth year following the effective date of the Commission's order?

3. Did the Interstate Commerce Commission misinterpret and misapply Section 5(2)(f) of the Interstate Commerce Act when it refused, in approving the merger of the Seaboard Air Line Railroad and the Atlantic Coast Line Railroad, to provide protection to the employees of the applicants, who will be adversely affected by reason of internal technological changes in operations resulting from the merger?

4. Did the Interstate Commerce Commission comply with the requirements of Section 5(2)(f) of the Interstate Commerce Act and of due process of law when it imposed employee protective conditions in its order approving the merger of the Seaboard Air Line Rail-

road and the Atlantic Coast Line Railroad different from the protective conditions proposed by either the employees or the applicants and without findings to support the imposition of such different conditions and without substantial evidence to support such conditions?

STATUTES INVOLVED

Sections 5(2)(a), 5(2)(b), 5(2)(c) and 5(2)(f) of the Interstate Commerce Act (49 U.S.C.A., Sections 5(2)(a), 5(2)(b), 5(2)(c) and 5(2)(f)) are involved and are reproduced in Appendix B, *infra*, pages 4a-6a.

STATEMENT

The orders of the Interstate Commerce Commission, which are the subject of this litigation, were entered in an administrative proceeding identified as *Seaboard Air Line Railroad Company—Merger—Atlantic Coast Line Railroad Company*, 320 I.C.C. 122. These orders approved, subject to conditions, the merger of the properties and franchises, including motor carrier operating rights, of Atlantic Coast Line Railroad Company into the Seaboard Air Line Railroad Company for ownership, management and operation, and various other transactions relating thereto (R. 393-398).[1]

The proposed merger is subject to the provisions of Section 5(2) of the Interstate Commerce Act (49 U.S.C.A., Section 5(2)), subparagraph (b) of which authorizes the Commission to approve the transaction if it is found to be consistent with the public interest upon terms and conditions and with modifications

[1] This administrative proceeding originated with the filing of an application by the Seaboard and the Coast Line on July 22, 1960, for authority to merge their properties and franchises (R. 206).

found to be just and reasonable. Subparagraph (c) provides that in passing upon the proposed merger the Commission shall give weight, *inter alia*, to "the interest of the carrier employees affected". In addition, Section 5(2)(f) of the statute provides that if the Commission approves the merger it shall as a condition thereof require a fair and equitable arrangement to protect the interests of the railroad employees affected.[2] This subparagraph reads as follows:

> "As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

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[2] The applicable provisions of Section 5(2) are quoted in full in Appendix B, *infra*, pages 4a-6a.

Section 17(11) of the Interstate Commerce Act (49 U.S.C.A., Section 17(11)) provides that representatives of employees of carriers may intervene and be heard in any proceeding arising under Chapter I of the statute in which Section 5(2) is found. The bulk of the employees of the Seaboard and the Coast Line as well as those of the Florida East Coast Railway Company, the Central of Georgia Railway Company, and the Southern Railway Company, all of which would be affected by the merger, are represented for the purposes of the Railway Labor Act (45 U.S.C.A., Section 151 et seq.) by the Brotherhood of Locomotive Engineers and the twenty-three other standard railway labor organizations affiliated with the appellant Railway Labor Executives' Association (R. 116). These organizations are:

> American Railway Supervisors Association; American Train Dispatchers' Association; Brotherhood of Locomotive Firemen and Enginemen; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railroad Trainmen; Brotherhood Railway Carmen of America; Brotherhood of Railway and Steamship Clerks; Brotherhood of Sleeping Car Porters; Hotel and Restaurant Employes and Bartenders' International Union; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers and Blacksmiths; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; International Organization Masters, Mates and Pilots of America; National Marine Engineers' Beneficial Association; Order of Railway Conductors and Brakemen; Railroad Yardmasters of America; Railway Employes' Department, AFL-CIO; Seafarers' International Union of North America; Sheet Metal Workers' International Association; Switchmen's Union of

North America; and Transportation-Communication Employees Union.

This Court has recognized the Association as the proper party to appear and speak for these organizations and the railroad employees they represent. *Interstate Commerce Commission* v. *Railway Labor Executives' Association,* 315 U.S. 373; *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142; *American Trucking Associations, Inc., et al.* v. *United States,* 355 U.S. 141. The Association (which then included the Brotherhood of Locomotive Engineers), therefore, intervened in the administrative proceedings on the merger application to present the employees' interest (R. 435).

It is clear that the merger will adversely affect a substantial number of railroad employees. These include employees of the Seaboard and the Coast Line who would lose their jobs through the abolition of 4255 positions within five years after the merger as well as at least 4439 other employees who would be required to change their places of residence in order to retain employment and who would either suffer demotions or other adverse effects flowing from such transfers (320 I.C.C. 199, 200).[3] It would also include a substantial number of employees of the Florida East Coast Railway Company, the Southern, and the Central of Georgia, whose employers would be required to reduce their employee rolls as a consequence of the competitive impact of the merger (Exhibit "B" to FEC Complaint, pages 110-111; 320 I.C.C. 203-204; R.

[3] The Association presented evidence that some 8839 employees of the applicants would be required to move their residences. While the Commission did not accept this figure, it did not find any precise number of job transfers that would result (320 I.C.C. 200).

313-314). The Commission recognized these adverse effects of the proposed merger (320 I.C.C. 199, 205; R. 308). It found, *inter alia*, that "Unfortunately, approval of the application here will have substantial adverse effects upon many railroad employees and their families". It went on to find, however, that these adverse effects upon employees alone, or combined with other possible adverse effects of the merger, were not sufficient to outweigh the public benefits which the Commission believed would flow from the merger. The Commission also suggested that the merger would provide greater job security for employees. It therefore declined to disapprove the merger because of the adverse effects upon employees (320 I.C.C. 200; R. 308).

The dissenting opinion of Commissioners Webb and Tucker contained the following comments on this Commission finding (320 I.C.C. at page 243):

> "There is one conclusion in the Commission's report which the more than 8,000 adversely affected employees of the applicants will probably regard as a cruel jest. I refer to the conclusion of the Commission that one of the public benefits to be derived from the merger is greater stability of employment. As previously noted, both the Seaboard and the Coast Line had more employees in 1962 than in 1961.
>
> "It is virtually impossible to devise any common scale for weighing human suffering and monetary benefits to corporations, yet section 5(2)(c) requires that appropriate weight be given to the effect of the proposed merger on employees. In those cases in which the advantages and other disadvantages of a proposed merger are in a state of near equilibrium, the adverse effect on employees should be decisive in denial of the application.

> Here, the benefits to be derived from this proposed merger are minimal, so minimal, in fact, that entirely apart from any significant lessening of competition, the adverse effect of the merger upon employees, coupled with the adverse effect upon other railroads in the region, is a sufficient ground for denial of the application."

Under these circumstances, the Commission was required under the mandate of Section 5(2) of the Interstate Commerce Act to provide fair and equitable arrangements to protect the interests of "the railroad employees affected".

At the time the Transportation Act of 1940 became effective, protection for employees adversely affected by railroad coordinations was provided by an agreement between the railway labor organizations and most of the nation's railroads identified as the "Agreement of May 1936, Washington, D. C." usually referred to as the Washington Job Protection Agreement, and by conditions prescribed by the Commission in the exercise of its discretion upon such transactions. *United States* v. *Lowden,* 308 U.S. 225; *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142. This agreement provided monetary compensation for employees displaced as a result of a railroad coordination, i.e. placed in a worse position with respect to compensation and rules governing working conditions, and for employees dismissed as a result of such coordination, i.e. deprived of employment. Such compensation was based upon length of service. An employee was also protected with respect to various benefits attached to his employment such as free transportation, pensions, hospitalization, relief and the like. The period of time during which the displacement or dismissal was re-

quired to take place in order for the benefits of the agreement to be applicable was related to the actual act of coordination, i.e. the unification, consolidation, merging or pooling of railroad facilities, operations or services. In the case of displacements, the period was 5 years from the effective date of the coordination. In the case of dismissals, the period was three years from the effective date of the coordination.[4]

After the Transportation Act of 1940 became effective, the Commission met its obligations under Section 5(2)(f) thereof by imposing conditions known as the "Oklahoma" conditions named for the proceeding in which such conditions were first imposed, i.e. *Oklahoma Ry. Co. Trustees Abandonment,* 257 I.C.C. 177. These conditions adapted the provisions of the Washington Job Protection Agreement but limited the compensation thereunder to a period of four years from the effective date of the Commission's order rather than from the date of the carrier's act affecting the employee. This was done in accordance with the Commission's then interpretation of Section 5(2)(f) as limiting employee protection to four years from the date of its order.

Subsequently, the Commission was confronted with an application for the approval of a consolidation of various railroad facilities at New Orleans in which the record disclosed that many employees affected by the consolidation would not be displaced until a period beyond four years from the effective date of the Commission's order. The Commission, however, refused

[4] This agreement is included in Exhibit "C", page 1, to the complaint of the Association in the court below (R. 498).

to provide protection for such employees on the ground that Section 5(2)(f) did not permit it to do so. *New Orleans Union Passenger Terminal Case,* 267 I.C.C. 763. The Association sought judicial review of the Commission's action and this Court subsequently held that the Commission had misinterpreted the statute and had the power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years from the effective date of its order approving a Section 5(2) transaction. *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142. On remand, the Commission "in conformity with the decision" of this Court imposed the terms of the Washington Job Protection Agreement as a condition of its approval of the consolidation there involved subject to the restriction that (a) employees adversely affected within four years from the effective date of the Commission's order should receive as a minimum the protection of the "Oklahoma" conditions, i.e. 100% compensation instead of the 60% provided by the Washington Agreement, and (b) the compensation of dismissed employees should be reduced by earnings received in other employment or under unemployment insurance laws. *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271. By the time the present merger application came before the Commission, the "New Orleans" conditions were the employee protective arrangements which the Commission, by long practice, had established as appropriate in merger transactions. *Louisville & Nashville R. Co. Merger,* 295 I.C.C. 457; *Norfolk and Western Ry. Co. Merger,* 307 I.C.C. 401; *Erie R. Co. Merger,* 312 I.C.C. 185.

While the present proceeding was in process before the Commission, that agency on November 7, 1962, approved the acquisition of control of the Central of Georgia Railway by the Southern Railway and imposed as a condition of its approval employee protective conditions which differed substantially from the "New Orleans" conditions. *Southern Railway Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557. On June 10, 1963, the Commission issued its order on reconsideration in which it purported to clarify the conditions but actually further changed them to the detriment of the employees. *Southern Railway Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 729.[5]

In the present case, the appellants sought the imposition of the "New Orleans" conditions with certain modifications to meet the requirements of Section 5(2)(f). The Seaboard and the Coast Line proposed the "New Orleans" conditions without modification (R. 114).

The Commission instead imposed the so-called "Southern-Central of Georgia" conditions. Although the Commission rejected the modification of the "New Orleans" conditions proposed by the appellants, it made no finding as to why it was appropriate to apply the so-called "Southern-Central of Georgia" conditions to the present case rather than the long stand-

[5] These conditions were the subject of judicial review in a complaint filed by the Association in the United States District Court for the Eastern District of Virginia. *Railway Labor Executives' Association* v. *United States*, 226 F. Supp. 521. The case was subsequently remanded to the Commission by this Court for clarification of its orders. *Railway Labor Executives' Association, et al.* v. *United States, et al.*, 379 U.S. 199. This "clarification" is now the subject of extensive hearings before the Commission.

ing "New Orleans" conditions advocated by the applicants and the employees. *Seaboard Air Line Railroad Co.—Merger—Atlantic Coast Line Railroad Co.*, 320 I.C.C. 122, 199-205. In its order dated March 4, 1964, upon reconsideration, the Commission included as a part of the employee conditions imposed the clarifications of the "Southern-Central of Georgia" conditions contained in its order of February 27, 1964 (R. 397, App. A, *infra*, p. 1a).

Regardless of the merits or demerits of the conditions imposed by the Commission with respect to those employees affected by the proposed merger which it did cover, the Commission's order did not protect many railroad employees affected by the merger. Thus, it did not protect employees displaced or dismissed pursuant to the Commission's approval of the merger after four years from the effective date of the Commission's order; it did not protect the employees of the Florida East Coast Railway, the Southern, and the Central of Georgia displaced or dismissed by their employers as a result of the merger; nor did it protect employees of applicants with respect to internal actions of the merged company made possible by the unification approved by the Commission, i.e. internal economies or internal technological improvements effected subsequent to the merger.

The litigation concerning the validity of the Commission's orders began when the Florida East Coast Railway, one of the rail carriers which will be injured by the impact of the merger, filed its complaint with the District Court to annul and set aside the Commission's action (R. 1). Thereafter, the Railway Labor Executives' Association intervened as a party-plain-

tiff in the litigation and filed its own complaint to annul and set aside such orders (R. 436). The complaint of the Association included all of the allegations and grounds for reversal of the Commission's action set forth in the complaint of the Florida East Coast Railway Company. In addition, the complaint contained allegations of errors by the Commission in its action with respect to the interests of the railroad employees affected by the merger (R. 444). The Southern Railway Company also intervened as a party-plaintiff. Although the United States was named as a statutory defendant in the complaints, it opposed the merger and thereby realigned itself as a party-plaintiff (FEC App. p. 2a).

On June 8, 1966, the District Court entered its judgment denying the relief sought by the complaints and granting judgment to the defendants. Pages 33 through 38 of the District Court's accompanying opinion dealt with the Commission's action with respect to the employees adversely affected by the merger and affirmed this action (FEC App. pp. 44a-50a).

The appeal of these appellants from the District Court's judgment concerns itself with those portions of the Commission's orders relating to the Commission's action under the statutory provisions relating to employees affected by the merger and the District Court's judgment affirming this action (R. 3222).

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents substantial questions with respect to the interpretation and application of Section 5(2)(f) of the Interstate Commerce Act, as follows:

A. THE COMMISSION'S ORDERS AFFIRMED BY THE DISTRICT COURT ERRONEOUSLY INTERPRETED SECTION 5(2)(f) AS AUTHORIZING IT TO DENY PROTECTION TO RAILROAD EMPLOYEES ADVERSELY AFFECTED BY THE PROPOSED MERGER

1. The Commission's Orders Erroneously Deny Protection to Railroad Employees Adversely Affected by the Proposed Merger Who Were Not Employees of the Applicants

The appellants requested that the Commission's protective conditions include all railroad employees affected by the merger, i.e. the employees of the Florida East Coast, the Southern and the Central of Georgia who would lose their jobs or be displaced as a consequence of the impact of the merger upon their employing carrier. The Commission's opinion approving the merger did not deny that there would be such adversely affected employees. Instead, it found that, although there were such employees, there was no basis for extending protection to such affected employees because they were employees of carriers outside of the transaction and there was no close-knit relationship between the carriers party to the transaction and the employers of these adversely affected employees. *Seaboard Air Line Railroad Co.—Merger—Atlantic Coast Line Railroad Co.*, 320 I.C.C. 122, 204. The District Court affirmed this holding of the Commission on the grounds that the requirements of Section 5(2)(f) are restricted to employees of the carriers involved in the transaction (FEC App. p. 50a).

This holding of the District Court and of the Commission is in square conflict with the language of the statute and with the holding of the Court in *Railway Labor Executives' Association* v. *United States*, 216 F. Supp. 101. In the latter case, the Seaboard Air Line Railroad entered into an agreement with the Richmond, Fredericksburg & Potomac Railroad Company to acquire joint control with the other railroad of the Richmond Terminal Railway and its terminal facilities in Richmond, known as the Broad Street Station. The two carriers involved in this transaction filed an application pursuant to Section 5(2) of the Interstate Commerce Act for approval of their arrangements. The application included a request for approval of trackage rights necessary for the Seaboard to operate into the Broad Street Station. The application indicated that upon approval of the transaction the Seaboard would abandon its arrangements with the Chesapeake and Ohio Railway Company for the operation of the Main Street Station in Richmond. The employees in this station were on the payroll of the Chesapeake and Ohio. As a result of the Seaboard action in abandoning the Main Street Station operation, their jobs were abolished and they either lost their jobs or were transferred. The Association requested that the Commission impose conditions on its approval of the agreements between the Seaboard and the Richmond, Fredericksburg & Potomac Railroad Company to protect the employees of the C&O involved on the grounds that they were adversely affected by the transaction. The Commission refused on the grounds that they were employees of a carrier outside of the transaction. The Association appealed this determination and it was re-

versed by the three-judge court which reviewed the Commission's order in the above-cited case. This Court held that the test of protection under Section 5(2)(f) is not who the employer may be but whether the employees involved are affected by the transaction. The Court's opinion on this point read as follows: (page 102)

> "Section 5(2)(f) commands protection of 'employees affected' by the 'transaction'. The 'transaction' here is the acquisition by Seaboard of the use of Broad Street station. The Act does not, as the Commission would say, limit its security to employees of a carrier involved in the transaction. The guardianship is not dependent upon the role of their employer in the transaction. All 'employees affected' are under the aegis of the Act. The only question is whether they are 'affected': Are they touched sufficiently by the transaction?"

Thus, when the Commission in the present case refused protection to adversely affected employees on the grounds that they were employees of carriers outside of the transaction and the District Court approved such action on the ground that Section 5(2)(f) "is restricted to the carriers involved in the transaction", the determinations were in square conflict with the holding of the three-judge court in the *Richmond Terminal* case. Neither mentioned that holding.

It is true that the Commission's opinion attempted to avoid this conflict by talking about the "proximity" of relationship of the employees. The dissenting opinion of Commissioners Webb and Tucker characterizes this effort for what it plainly is. Such dissent, after pointing to the holding by the three-judge court

in the *Richmond Terminal* case, finds as follows (320 I.C.C. U.S. 243-244):

> "The Commission pays only lipservice to that requirement. Affected employees of carriers outside the transaction are entitled to protection by virtue of their proximity or the proximity of their employer to the transaction. It would be hard to imagine a closer proximity than that which exists between the proposed transaction and the employees of carriers whose destruction is anticipated or of carriers which the report finds will suffer a substantial diversion of traffic.
>
> "There is a special reason for extending protection in this case, quite apart from any requirement of law or the great financial strength of the merged company. Those carriers that are compelled to seek refuge under condition 14 of appendix XI of the report will have a strong incentive to pare their payrolls to the bone prior to negotiating with the merged company. Employees discharged prior to the consummation of condition 14 mergers will receive no protection whatever. Also, employees of the Central of Georgia, for example, who lose their jobs as a result of traffic diversion will not be protected either under the conditions imposed when the Southern acquired control of that carrier or under the conditions imposed by the Commission in this proceeding."

Moreover, the District Court did not accept the Commission's attempted maneuver and affirmed the action solely on the ground that the Commission was not required to protect employees of carriers not involved in the transaction, even though they were adversely affected thereby, thus bringing it in square conflict with the *Richmond Terminal* decision.

The decision in the *Richmond Terminal* case is also clearly correct in its interpretation of the scope of Section 5(2)(f).

First: It is commanded by the clear language of the first sentence of Section 5(2)(f) of the statute which requires the Commission in approving Section 5(2) transactions to "require a fair and equitable arrangement to protect the interests of the railroad employees affected". *Flora* v. *United States,* 357 U.S. 63, 65; *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Company,* 353 U.S. 30, 35.

Second: The clear and unambiguous language of Section 5(2)(f) is reinforced by Section 222(f) of the Communications Act of 1934 (47 U.S.C.A., Section 222(f)), which provides for employee protection in the merger of telegraph carriers. The cited statutory provision specifically provides that in telegraph mergers protection shall be accorded only to an employee of "any carrier which is a party to a consolidation or merger". This statute was passed in 1934. When Congress subsequently enacted Section 5(2)(f) of the Interstate Commerce Act in 1940, it deliberately did not so limit protection of railroad employees in mergers or similar transactions. This Court cited the provisions of the Communications Act and the differences between such statute and Section 5(2)(f) of the Interstate Commerce Act in determining the type of protection provided by the latter statute. *Brotherhood of Maintenance of Way Employes, et al.* v. *United States,* 366 U.S. 169, 175. In that case, the differences between the two statutes worked against the employees' contention that Section 5(2)(f) required job protec-

tion in contrast to financial compensation. Here, the differences between the two statutes clearly support the employees' position that the protection accorded by Section 5(2)(f) is not limited to employees of applicants or carriers involved in a transaction.

Third: The Commission's position is contrary to that which it took before the Supreme Court in *Brotherhood of Maintenance of Way Employes, et al.* v. *United States,* 366 U.S. 169, to which reference is made in its decision in this case. In that case, the Commission advised this Court in its brief that (a) the first sentence of Section 5(2)(f) constitutes a *broad grant* of discretion to the Commission to do what it deems necessary in the circumstances to "aid those who are 'affected' and hence faced with losses" (Br. 15) and that it thus undertakes "to provide protective conditions or benefits for those *who are in fact adversely affected*" (Br. 20);[6] and (b) the second sentence requires that those "*who are economically injured* in consequence of a Section 5 transaction" receive full benefits (Br. 11).[7]

It is submitted that it is inconsistent for the Commission on the one hand to advise this Court for the purpose of impressing upon the Court the broad scope of the protection provided by Section 5(2) in support of its view that the Section does not mandatorily require job protection, that the statute provides a program for protecting *all* railroad employees who are adversely affected or who are economically injured in consequence of a Section 5(2) transaction, and to now

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[6] Emphasis supplied.

[7] Emphasis supplied.

take the position that such Section does not protect adversely affected employees of carriers who are "outside" of the transaction.[8]

2. The Commission's Orders Affirmed by the District Court Erroneously Deny Protection to Employees Adversely Affected in the Fifth Year After the Merger

In *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, this Court held that the Commission had erroneously interpreted Section 5(2)(f) as limiting protection to only those employees adversely affected during a period of four years from the date of the Commission's order approving a transaction. The Court's holding on this point read as follows (page 155):

> "We conclude, therefore, that the Commission, while required to observe the provisions of the second sentence of § 5(2)(f) as a minimum protection for employees adversely affected, is not confined to the four-year protective period as a statutory maximum. The Commission has the power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years from the effective date of the order approving the consolidation."

Subsequently, on remand the Commission entered an order which it described as being "in conformity with

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[8] Nor has there been any consistent application of such an interpretation by the Commission, as suggested by the District Court (FEC App. p. 49a). In fact, the Commission has applied this view only in an arbitrary manner when it has seen fit to do so. *Cf., Gulf, Mobile & Ohio Railroad Company Abandonment*, 282 I.C.C. 311; *Texas & Pacific Railway Company Operation*, 247 I.C.C. 285; *International-G. N. R. Co. Trustee Trackage Rights*, 215 I.C.C. 27; *Louisville & Nashville R. Co.* v. *United States, et al.*, 244 F. Supp. 337, aff'd *Louisville & Nashville R. Co.* v. *United States, et al.*, — U.S. —, 15 L. Ed. 2d 615 (February 21, 1966).

the decision of the Supreme Court of the United States in *RLEA* v. *United States*", and which provided protection for the employees who would be injured by consolidations taking place more than four years after the effective date of the Commission's order in that case. The Commission accomplished this purpose by imposing the Washington Job Protection Agreement as its conditions with two modifications affecting the amount of compensation received. *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271. Since the Washington Agreement contains time limitations only following the actual physical coordinations, the employees injured in the fifth year in that case were protected.[9]

The evidence before the Commission submitted by the applicants shows that a total of 350 employees will be adversely affected in the fifth year from the Commission's approval of the proposed merger. Two hundred sixty-seven jobs will be abolished during such year and 89 employees will be transferred through consolidations then made pursuant to the merger authority (Exhibit H-37, Study 10, Schedule A, page 1).

However, when the Commission imposed its protective conditions in the present case, it did not include protection for employees adversely affected beyond a period of four years after the date of the Commission's order. This interpretation of the conditions was admitted by the Commission's General Counsel before the District Court, who took the position that the restriction was valid because "the same limitation ap-

[9] This agreement appears in the Record at page 1 of Exhibit C to the Complaint of the Association in the District Court (R. 498).

pears in New Orleans" (page 413 of Oral Argument before District Court on July 18, 1964).

The District Court on the other hand affirmed the Commission's orders on the grounds that the conditions imposed (which it referred to as *Southern Railway* conditions) protected employees adversely affected during the first five years after the effective date of the Commission's order (FEC App. p. 47a). The District Court's finding was based upon an interpretation of the conditions here imposed made by the Commission's General Counsel at the further hearing before the three-judge court on February 24, 1966, at page 143 of the Transcript.[10] However, the statement to which the District Court refers must be read in the light of the extensive discussion on this point by the same General Counsel in the original hearing before the District Court in which he explained that the employee had to be adversely affected within the four-year period but could receive compensation beyond that period. In this statement, he made clear that an employee first affected beyond the four-year period, as is the case of the 350 employees here involved, would not receive protection under the Commission's conditions. This discussion takes place at pages 412-414 of the Transcript of the oral argument on July 18, 1964. The argument of the Commission's General Counsel there is to the effect that the Commission had not changed the "New Orleans" conditions with respect to protection of an employee affected in the fifth year; that in the "New Orleans" conditions the Commission had given the employees what they requested; and finally that the adverse effect must occur within the four-year period under the "New Orleans" condi-

[10] See footnote 42 of the District Court's decision.

tions. This clearly appears from the statement of the General Counsel at page 414 of such Transcript in that hearing, which reads as follows:

> "But under the provisions which they themselves proposed on remand from the Supreme Court in RLEA, *the employee had to be adversely affected, first, adversely affected within the four-year period. And in the reopened New Orleans proceedings, the Commission gave them exactly what they wanted, practically verbatim.*
>
> "It said that the Washington protection would apply to employees adversely affected within four years from the effective date of the order approving the transaction.
>
> "So there is no departure here from the corresponding provisions of the New Orleans. It was the same provision in L&N and M. & St. L., no objection; same thing in Erie-Lackawanna merger, no objection.
>
> And of course, the minimum protection required by Section 5(2) is measured in terms of four years from the effective date of the order; but, of course, even here, if the man is affected within four years, his protection may go on, depending upon the circumstances, for two or three more years." (Emphasis supplied.)

There can thus be no question that the conditions which the Commission here imposed, as interpreted by its General Counsel, do not protect the 350 employees which the evidence shows will be adversely affected in the fifth year after approval of the merger and that the Commission's defense of this failure to protect these adversely affected employees rests entirely on the argument that this is what was done in New Orleans on remand. This defense is wholly without substance.

First, it was not accepted by the District Court which interpreted the "New Orleans" conditions as protecting employees adversely affected beyond the four-year period. The District Court's finding on this point reads as follows: (FEC App. p. 41a).

> "In the *New Orleans Union Passenger Terminal* case, 282 I.C.C. 271, the Commission went a step further and extended financial compensation beyond the four-year period provided in the *Oklahoma* conditions."

Second, the argument makes no sense in the context of the litigation concerning the "New Orleans" conditions. That litigation, as shown by this Court's decision, arose out of the fact that the Commission's order "disclosed that many employees affected by the consolidation would not be displaced until the completion of the project and that, therefore, they would receive no compensatory protection". The date for the completion of the project was four years after the date of the Commission's order. Therefore, the injury over which that litigation occurred was injury involving employees adversely affected thereafter. *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142 at pages 144, 145. It was the Commission's interpretation that these employees were not covered by Section 5(2)(f) which this Court reversed. On remand, the Commission's recital of the facts clearly showed that a substantial number of employees would be affected during the fifth year after the date of the Commission's order. Moreover, the action which the Commission there took was stated by it to be "in conformity with the decision of the Supreme Court of the United States". *New Orleans Union Passenger*

Terminal Case, 282 I.C.C. 271, 276, 281. To now contend that the Commission did not in effect provide protection for employees affected in the fifth year and that it did not do so at the specific request of the Association is an incredible argument. It can only be explained in terms of the total confusion and chaos which have resulted from the Commission's attempts to re-form the "New Orleans" conditions without any evidence and in a manner not suggested by any party to this case.

Third, the Commission's 1966 interpretation is contrary to the two arbitrations which have taken place under the "New Orleans" conditions. Copies of these arbitration decisions which were submitted to the District Court are attached hereto as Appendices C and D. They show that one employee was given compensation under the "New Orleans" conditions who was first affected five years and 11 months after the effective date of the Commission's order. The other employee was first affected six years and nine months after the effective date of the Commission's order.

It is clear that it was the duty of the Commission to provide protection for the 350 employees who would be adversely affected in the fifth year after the effective date of the Commission's order. It is equally clear from the Commission's defense of this action that it has not done so. The District Court's decision, based on the assumption that it had done so, simply adds to the confusion already surrounding these conditions. The situation requires this Court to review the conditions with respect to the requirements of the statute and to make clear that the Commission must meet those requirements.

3. The Commission's Orders Affirmed by the District Court Erroneously Exclude Protection to Employees Adversely Affected by Internal Changes Made Possible Only by the Merger

The Commission in this case simply adopted the so-called "Southern-Central of Georgia" conditions by reference. These include those conditions as interpreted by the Commission's report of June 10, 1963. in the *Southern Railway Co.—Control—Central of Georgia Railway Co.* case (Exhibit D to the Complaint; R. 526). At pages 6 and 7 of that report the Commission states that it is not its intention that employees adversely affected by internal technological improvements made by the applicants shall be entitled to the benefit of protection even if such improvements result from the Commission's orders and the unification of control thereunder (R. 531-532). In affirming the Commission's orders, the District Court did not specifically deal with this issue (FEC App. pp. 44a-50a).

It is respectfully submitted that the Commission's orders constitute a restriction on the clear language of Section 5(2)(f). The mandate to the Commission by the language of Section 5(2)(f) is clear and unambiguous. It specifically provides that the Commission shall provide protection to protect the "interests of the railroad employees affected" and for the "employees of the carrier or carriers by railroad affected" by the approved transaction. It does not say, as does the Commission's June 10, 1963, report in the *Southern-Central* case, here adopted by reference (Exhibit D to Complaint; R. 532), that the Commission must protect those railroad employees who are adversely affected "if they are affcted by a coordination and

not by internal economies resulting from the transaction". The statute very simply defines the railroad employees covered by its provisions as those who are "affected" by the transaction.

In *Nebraska Power Company* v. *Omaha Ice & Cold Storage,* 147 Neb. 324, 23 N.W. 2d 312, the Supreme Court of Nebraska held that it is apparent on the face of it, that the word "affected" is "not a word of art, but a word of ordinary English. It is capable of a very large meaning" (23 N.W. 2d at 312). The meaning of the ordinary word "affect" is also defined by Black's Law Dictionary (page 72):

> "To act upon; influence; change; enlarge or abridge; often used in the sense of acting injuriously upon persons or things."

In Section 5(2)(f) the word "affected" is obviously used in the latter sense since the Section speaks of protecting the interests of employees affected. Only employees whose interests are injured would need protection.

Thus, Section 5(2)(f) imposes in plain language the mandate upon the Commission to protect the interests of railroad employees injured by a transaction. The statutory test is not one of the nature of the act taken by the carrier as a result of a transaction, but a factual test of the causal relationship between the employee claiming protection and the transaction, i.e. is the employee "affected" or "injured" by the transaction, which can be decided only in an arbitration of the claims of the individual employee, if denied by the carrier, as such questions have always been decided under Commission practice.

In the twenty-three year history of Section 5(2)(f), the Commission consistently and repeatedly has held that all questions as to the application of particular provisions of protective conditions to particular employees were factual questions to be determined by an arbitrator, each upon its own facts. The Commission's position on this point was clearly stated in *Louisville & Nashville R. Co., et al. Merger,* 312 I.C.C. 676, where after holding that a group of employees were entitled to the benefits of the employee protective conditions imposed therein, the Commission concluded as follows (312 I.C.C. at 684):

> "Questions as to whether, when, and to what extent the terminal employees, or any of them, have been affected as a result of, or in anticipation of, the merger, are not before us; and any dispute as to such matters is to be resolved under the arbitration procedures provided in the prescribed conditions."

Indeed, in the *Southern-Central* case Southern had attempted, as it had in many previous cases, to seek a restriction upon the scope of the protective conditions by excluding therefrom employees who might be affected by "internal economies" or "internal technological improvements" effected "subsequent to the acquisition of control". The Commission rejected that contention in the following language (Compl., Exhibit "B", pp. 21-22; R. 483-484):

> "Applicant takes the position that none of the conditions imposed should afford benefits to employees who may be adversely affected subsequent to the acquisition of control by reason of internal technological improvements and economies effected by Central. It requests that we expressly hold

that the labor conditions prescribed do not apply to employees so affected. This request must be denied. If we approve the transaction, we are required by section 5(2)(f) to include terms and conditions providing that, for a prescribed period, the 'transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment.' In conformity therewith, conditions heretofore prescribed by us and those which will be prescribed herein protect an employee 'if as a result of' the particular transaction he is adversely affected in his employment. We may not by interpretation narrow the scope of the protection intended by the statute. Both the statute and the condition mean what is literally stated, i.e., that an employee is protected against adverse effects suffered in his employment as a result of the transaction. Questions as to whether adverse effects suffered by particular employees in their employment result from the transaction are questions of fact which can be determined under the circumstances of particular cases and must be left for the determination of the arbitrators in case of dispute."

One month later in the *C&O-B&O Control Case,* 317 I.C.C. 261, the identical contention was made by the C&O and it received the identical rejection (317 I.C.C. at 288-289):

"The applicant takes the position that we are not authorized to provide protection for employees affected by the proposed capital improvement program. In considering a somewhat similar contention in the *Southern Control* case we stated: [there follows the quotation from the *Southern-Central* case set forth above].

"Those remarks are equally applicable here."

The Southern raised the contention again on a petition for rehearing and the Commission contrary to twenty-two years of consistent interpretation on this point reversed itself and held (Compl., Exhibit "D", pp. 6-7; R. 531-532):

> "It is plain under the conditions that an employee would be entitled to benefits if adversely affected by a coordination of the operations of applicant and Central or by the shifting of functions from one to the other. However, the effect of subsequent internal technological improvements by either of the carriers, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect and remote to be considered a result of the transaction; and it is not our intention that employees affected by such internal improvements shall be entitled to the benefit of the conditions."

Assuming for the sake of argument that the Commission, upon a proper factual basis, could restrict the protection afforded by the statute and need not justify a reversal of twenty-three years of consistent policy, there are no facts of record in the instant case which justify the restriction of protection accomplished by the June 10 order in the *Southern-Central* case. In fact, the carriers here did not request such a restriction as did Southern in its case and the C&O in its case. Without a specific factual finding to justify such a restriction of protection, the adoption of the June 10 order from the *Southern-Central* case is invalid.

B. THE COMMISSION'S ORDERS ON EMPLOYEE PROTECTION WERE ENTERED WITHOUT ADEQUATE FINDINGS AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The actions of the Commission, like those of any other Federal administrative agency, must, of course, be based upon adequate findings supporting its ultimate statutory findings and these must, in turn, be supported by adequate evidence. *Secretary of Agriculture* v. *United States, et al.*, 347 U.S. 645; *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 488, 489. This requirement applies to the provisions of Section 5(2)(f), making it mandatory that the Commission provide fair and equitable arrangements to protect adversely affected railroad employees, as well as to the other statutory provisions of Section 5(2).

In the present case, the Association asked the Commission to impose the "New Orleans" conditions with certain modifications (R. 116). The applicants asked the Commission to impose the "New Orleans" conditions without any such modifications (R. 114). The Commission did neither. Instead, it came up with a new set of conditions which it had only recently imposed in the *Southern-Central of Georgia* case. In adopting these conditions which had not been proposed by any appellant in the case, the Commission referred to the modifications in the "New Orleans" conditions proposed by the Association and set forth its reasons for rejecting those modifications. However, the only findings which it made with respect to the conditions which it did impose were the ultimate statutory findings under Section 5(2)(f). It made no subsidiary findings with respect to any changes which it had made in the "New Orleans" conditions other than those relating to the arbitration provision. *Seaboard*

Air Line Railroad Co.—Merger—Atlantic Coast Line Railroad Co., 320 I.C.C. 122, 199-205. The Commission made no subsidiary findings to support the many other departures from the "New Orleans" conditions involved. It, of course, did not have any evidence before it to support such departures because (a) neither party to the proceeding had addressed itself to such conditions, and (b) it would have been physically impossible for any such evidence to be present since the conditions in the *Southern-Central* case were imposed while the present case was pending before the Commission.

The District Court nevertheless affirmed the Commission's orders on the ground that the Commission had used "a shorthand method of saying that, after consideration of all arguments, it applies the same conditions here as in *Southern*" (FEC App. p. 48a). Such a shorthand approach might be justified in a case where there was presented to the Commission the question of whether the conditions which it imposed were adequate and *evidence* and arguments were addressed to that issue. However, in the present case, the Commission, without any argument being addressed at all to such conditions and without one scintilla of evidence being directed to such conditions, simply arbitrarily stated that it would impose the conditions. In the present case, it could have imposed the "New Orleans" conditions without any modifications upon the basis of proper findings and evidence, since the carrier applicants had so requested and had addressed arguments to that request. It would have also imposed the attrition conditions requested by the Association or the "New Orleans" conditions as modified in the proposals of the Association with adequate

findings since evidence and arguments were directed to this issue. However, it had no basis to impose some other conditions to which no evidence or no argument had been directed. The clearest proof of the arbitrary nature of the Commission's action lies in the fact that it made no subsidiary findings to support the conditions imposed by it nor did it refer to a single item of evidence supporting its ultimate statutory findings. As far as anyone is concerned, there is no basis in the Commission's opinion to show why it so acted and the basis therefor.

CONCLUSION

The appellants respectfully submit that this Court has jurisdiction of the appeal and that it presents substantial qustions with respect to the interpretation and application of Section 5(2) (f) of the Interstate Commerce Act. Jurisdiction should be noted.

Respectfully submitted,

EDWARD J. HICKEY, JR.
JAMES L. HIGHSAW, JR.
WILLIAM G. MAHONEY
WILLIAM J. HICKEY
620 Tower Building
Washington, D. C. 20005
Attorneys for Appellants

Of Counsel:

MULHOLLAND, HICKEY & LYMAN
620 Tower Building
Washington, D. C. 20005

October 6, 1966

APPENDIX A

SERVICE DATE
March 6, 1964

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of March A.D. 1964.

Finance Docket No. 21215

SEABOARD AIR LINE RAILROAD COMPANY—MERGER—
ATLANTIC COAST LINE RAILROAD COMPANY

Finance Docket No. 21254

ATLANTIC COAST LINE RAILROAD COMPANY BONDS

Upon consideration of the record in the above-entitled proceeding, of the petitions, filed January 13, 1964, on behalf of (a) Union Bag-Camp Paper Corporation, (b) Florida East Coast Railway Company, (c) Gulf, Mobile and Ohio Railroad Company, (d) Illinois Central Railroad Company (including request for oral argument), (e) Central of Georgia Railway Company and Savannah & Atlanta Railway Company, (f) Southern Railway Company et al., and (g) Railway Labor Executives' Association, for reconsideration of the report and order of December 2, 1963; and of the reply of applicants, filed February 3, 1964; and

It appearing, That the employee-protective conditions set forth in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557, as supplemented in 317 I.C.C. 729, were imposed herein; that on February 27, 1964, the said conditions were clarified; and that such conditions as clarified are, and continue to be, applicable to this proceeding;

It further appearing, That, subject to certain restrictions, the Southern Railway Company operates over a line of the Atlantic Coast Line Railroad Company between

Hardeeville, S. C., and Jacksonville, Fla., via Savannah, Ga., under trackage agreements with the said Atlantic Coast Line Railroad Company; that the said trackage agreements, as interpreted by the parties thereto, may preclude the Southern Railway Company from interchanging freight traffic at Savannah with either Central of Georgia Railway Company or the Savannah & Atlanta Railway Company in connection with movements to, from, or through the Jacksonville gateway;

It further appearing, That Condition 8, relating to the opening of the Jacksonville gateway by the merged company should be clarified and modified to require the Seaboard-Coast Line Railroad Company to provide the Central of Georgia Railway Company, the Savannah & Atlanta Railway Company and other affiliates and subsidiaries of the Southern Railway Company with the right to interchange freight traffic with the Southern Railway Company at Savannah in connection with movements to, from or through the Jacksonville gateway via the Hardeeville-Jacksonville segment;

And it further appearing, That, except as the petitions are granted for the purpose of the modification herein approved, the material matters set forth in the petitions have been considered by the Commission and discussed in its report, that the decision is based on adequate findings supported by the record, that there has been presented no error of fact or law with respect to the matters complained of by petitioners, that no showing has been made warranting reconsideration of the said decision, and that further oral argument is unnecessary:

It is ordered, That the proceeding be, and it is hereby, reopened for reconsideration solely for the purpose of modifying Condition No. 8 of the routing and gateway conditions; and that the said condition be, and it is hereby, modified as follows:

Condition No. 8, after the word "gateway" at the end of Condition No. 8, delete period, insert comma in lieu of period, and add the following:

and, *Provided further* that the Seaboard Coast Line Railroad Company shall take such further action as may be necessary to permit the interchange of freight traffic between Southern Railway Company and Central of Georgia Railway Company, Savannah & Atlanta Railway Company and other affiliates and subsidiaries of the Southern at Savannah in connection with movements to, from, or through the Jacksonville gateway by the Southern Railway Company under existing trackage arrangements permitting operations by that rail carrier between Hardeeville and Jacksonville over a line of the Seaboard Coast Line Railroad Company.

It is further ordered, That in all other respects the said petitions be, and they are hereby, denied.

And it is further ordered, That the order of December 2, 1963, as herein modified, shall become effective from and after 35 days from the date of service.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)

APPENDIX B

Statutes Involved

Interstate Commerce Act (49 U.S.C.A.):

1. Section 5(2)(a):

"It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto."

2. Section 5(2)(b):

"Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers in-

volved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

3. Section 5(2)(c):

"In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction

upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

4. Section 5(2)(f):

"As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

APPENDIX C

Section 13 Arbitration Committee

DOCKET NO. 52—*Decision by Referee Gilden*

PARTIES TO DISPUTE
NEW ORLEANS UNION PASSENGER TERMINAL
ILLINOIS CENTRAL RAILROAD COMPANY

v.

RAILWAY EMPLOYES' DEPARTMENT, AMERICAN FEDERATION OF LABOR, SYSTEM FEDERATION NO. 99

QUESTION: (1) That under the current agreement concerning changes in operation at New Orleans, Louisiana, pursuant with Interstate Commerce Commission, Finance Docket No. 15920, and the Washington Job Protection Agreement of May, 1936 furloughed Sheet Metal Worker, J. T. Moore, New Orleans Union Passenger Terminal has been denied compensation he is entitled to under the provisions of the Washington Job Protection Agreement.

(2) That accordingly the Carrier be ordered to compensate the aforesaid furloughed employee for all time lost from February 16, 1955.

FINDINGS: By these actions, Sheet Metal Worker J. T. Moore (Docket 52), and Boilermaker Helper Isiah Spencer (Docket 53), seek recovery of the respective benefits to which they may be entitled under the arrangements imposed January 16, 1952, by the Interstate Commerce Commission in Finance Docket 15920 (for the protection of employees adversely affected by the New Orleans Union Passenger Terminal coordination) and the terms of the subsequent Implementing or Transfer Agreement dated April 10, 1953.

Upon the abolishment of their jobs on the Illinois Central, as a consequence of said coordination, Moore and Spencer were transferred on April 16, 1954, in their re-

spective classifications of Sheet Metal Worker and Boilermaker Helper, to the employ of the NOUPT, on the basis of the formula prescribed in Section 1(b) of said Implementing Agreement, for distributing the available NOUPT job openings among the employees in such class or craft on the various carriers involved. Thereafter, and within approximately ten months from the inception of NOUPT operations on April 16, 1954, both men were furloughed—Moore on February 12, 1955, and Spencer on February 23, 1955.

Lacking a conclusive showing of any appreciable change in the NOUPT's level of activities during the first ten months of its existence, it is apparent that Moore and Spencer's separation, following their brief tenure of NOUPT employment, is just as surely an aspect of the coordination as would be the case if these individuals had not initially been placed on the payroll, and were considered, right from the start, as being adversely affected by the transaction. Clearly, Terminal hirings which plainly bear the imprint of the imponderables of the new venture, and, in a comparatively short time become casualties thereof, are not absolved from the dictates of the ICC's ruling in Finance Docket 15920. Indeed, by safeguarding against a deferred, but nonetheless genuine adverse effect directly attributable to the coordination, Section 6 of the Implementing Agreement specifically preserves the employee's eligibility for said protective conditions. Moreover, the last sentence of this provision makes it clear that these employees qualify for said protective conditions notwithstanding that the adverse effect engendered by their transfer to the Terminal is not discernible until more than sixty days elapsed after such happening.

Significantly, ICC Finance Docket 15920 decreed that the protection afforded by the Washington Agreement (subject to certain limitations on which there is no need to comment at this time) should be extended to all em-

ployees adversely affected by the NOUPT coordination. The claimants herein are entitled to no more or no less than the full extent of such increment. The carrier proposition that the Washington Agreement was superseded by the enactment of Section 5(2)(f) of the Interstate Commerce Act as amended, and is no longer applicable to transactions requiring approval under Section 5(2), has already been rejected by this Committee in Award No. 3, Docket No. 27. In these findings, we adhere to and expressly reaffirm the validity of that conclusion. In furtherance thereof, we hold that the asserted jurisdictional deficiency on the part of this Committee and the Referee appointed thereto to decide this dispute is without substance. (Emphasis Supplied).

DECISION: 1. That the Illinois Central Railroad Company shall forthwith remunerate Sheet Metal Worker J. T. Moore with the compensation accruing to him under the terms of the "Agreement of May, 1936, Washington, D. C." subject to the limitations on such recovery affixed on January 16, 1952, by the Interstate Commerce Commission in Finance Docket 15920.

2. That the Illinois Central Railroad Company shall forthwith remunerate Boilermaker Helper Isiah Spencer with the compensation accruing to him under the terms of the "Agreement of May, 1936, Washington, D. C.", subject to the limitations on such recovery affixed on January 16, 1952, by the Interstate Commerce Commission in Finance Docket 15920.

APPENDIX D

Section 13 Arbitration Committee

DOCKET No. 53—*Decision by Referee Gilden*

PARTIES TO DISPUTE
NEW ORLEANS PASSENGER TERMINAL
AND ILLINOIS CENTRAL RAILROAD COMPANY

v.

RAILWAY EMPLOYES' DEPARTMENT, AMERICAN FEDERATION OF LABOR, SYSTEM FEDERATION No. 99

QUESTION: Isiah Spencer, Boilermaker Helper, New Orleans Passenger Terminal has been unjustly denied compensation due him under the provisions of Interstate Commerce Commission Finance Docket 15920 and the Washington Job Protection Agreement of May, 1936.

That accordingly the Carrier be ordered to compensate Isiah Spencer in accordance with Interstate Commerce Commission Finance Docket 15920 and Washington Job Protection Agreement of May, 1936.

FINDINGS: Identical to Findings in Docket No. 52.

DECISION: 1. That the Illinois Central Railroad Company shall forthwith remunerate Sheet Metal Worker J. T. Moore with the compensation accruing to him under the terms of the "Agreement of May, 1936, Washington, D. C." subject to the limitations on such recovery affixed on January 16, 1952, by the Interstate Commerce Commission in Finance Docket 15920.

2. That the Illinois Central Railroad Company shall forthwith remunerate Boilermaker Helper Isiah Spencer with the compensation accruing to him under the terms of the "Agreement of May, 1936, Washington, D. C.", subject to the limitations on such recovery affixed on January 16, 1952, by the Interstate Commerce Commission in Finance Docket 15920.

FILED
OCT 7 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 641

SOUTHERN RAILWAY SYSTEM, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Middle District of Florida, Jacksonville Division

JURISDICTIONAL STATEMENT

W. GRAHAM CLAYTOR, JR.
Box 1808
Washington, D. C. 20005

JOHN K. MALLORY, JR.
STEPHEN R. BARNETT
1250 Connecticut Ave., N.W.
Washington, D. C. 20036

Attorneys for Appellants Southern Railway Co. et al.

Of Counsel:

WILLIAM D. MCLEAN
Washington, D. C.

JOHN B. MILLER
Savannah, Georgia

October 1966

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

SOUTHERN RAILWAY SYSTEM, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Middle District of Florida, Jacksonville Division

---

JURISDICTIONAL STATEMENT

Appellant Southern Railway System, intervening plaintiff in the court below, appeals from the judgment of the United States District Court for the Middle District of Florida, Jacksonville Division, entered June 8, 1966, upholding orders of the Interstate Commerce Commission which approved the proposed merger of the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad Company and the

related acquisition of control by the merged company of the Louisville & Nashville Railroad Company. This statement is submitted by appellant, in compliance with Rules 13 and 15 of this Court, to show that the Supreme Court of the United States has jurisdiction of the appeal and that the questions presented are substantial.

OPINIONS BELOW

The opinion of the District Court is not yet reported. Copies of that opinion and of the judgment of the District Court of the same date are set out as Appendix A, pp. 1a-50a, to the Jurisdictional Statement being filed simultaneously herewith by the Florida East Coast Railway Company. (The appendices to that Jurisdictional Statement are hereinafter cited as "FEC Appendix" or "FEC App.")

The report of the Interstate Commerce Commission, *Seaboard Air Line RR. Co.—Merger—Atlantic Coast Line RR. Co.*, December 2, 1963, appears at 320 I.C.C. 122. Copies of this report have been furnished for the convenience of the Court. The orders of the Commission dated December 2, 1963, and March 4, 1964, are set out as FEC Appendices E and F, FEC App. pp. 83a and 87a. The report of the Commission's hearing examiner was set forth as Appendix E, App. vol. II, to the Jurisdictional Statement filed by Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, *et al.*, in *Seaboard Air Line RR. Co.* v. *United States*, No. 425, October Term, 1965.

The *per curiam* opinion of this Court, 382 U.S. 154 (November 22, 1965), vacating the District Court's previous order, is set out as FEC Appendix B, FEC App. pp. 51a-53a.

The previous opinion of the District Court is reported at 242 F. Supp. 14 (M.D. Fla., May 13, 1965). The opinion is set out as FEC Appendix C, FEC App. pp. 54a-70a.

JURISDICTION

This action was instituted by the Florida East Coast Railway Company, pursuant to 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325, to set aside orders of the Interstate Commerce Commission entered under Section 5(2) of the Interstate Commerce Act, 54 Stat. 905, 49 U.S.C. § 5(2). Those orders approved and authorized, subject to certain conditions, the merger of the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad Company and the related acquisition of control by the merged company of the Louisville & Nashville Railroad Company. Appellant Southern Railway System, comprising the Southern Railway Company and its affiliates, intervened in the action as a party plaintiff in opposition to the merger, as did the Railway Labor Executives' Association and, more recently, the City of Tampa, Florida. The defendant Interstate Commerce Commission, represented by its General Counsel, appeared in support of its orders. The defendant United States of America, represented by the Department of Justice, appeared in opposition to the merger and was realigned as a party plaintiff. The Seaboard Air Line Railroad Company, the Atlantic Coast Line Railroad Company, the Atlantic Coast Line Company (a holding company controlling the Atlantic Coast Line Railroad Company), and the Mercantile-Safe Deposit and Trust Company (a trust company which in turn, as fiduciary, controls the Atlantic Coast Line Company) all intervened as

parties defendant in support of the Commission's orders and of the merger.[1]

The judgment of the three-judge District Court for the Middle District of Florida, denying the injunction sought by the plaintiffs and entering judgment in favor of the defendants, was dated and entered June 8, 1966. On June 14, 1966, that court stayed the operation and effective date of the ICC orders pending timely appeal to this Court and pending the final determination of such appeal. Notice of Appeal was filed in that court on August 8, 1966, by this appellant.

The jurisdiction of this Court to review the judgment of the District Court on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). Cases sustaining the jurisdiction include *United States* v. *Drum*, 368 U.S. 370 (1962); *Minneapolis & St. L. RR. Co.* v. *United States*, 361 U.S. 173 (1959); and *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944).

STATUTES INVOLVED

The statutory provisions governing approval by the Interstate Commerce Commission of the consolidation and merger of railroads are contained in Sections 5(2)(a), 5(2)(b), 5(2)(c), 5(2)(f), and 5(11) of the In-

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[1] Short name forms will sometimes be used herein, as follows:

Coast Line—Atlantic Coast Line Railroad Company;
Seaboard—Seaboard Air Line Railroad Company;
Florida East Coast—Florida East Coast Railway Company;
L & N—Louisville & Nashville Railroad Company;
Southern—Southern Railway Company and its affiliates in the Southern Railway System;
Merged Company—Seaboard Coast Line Railroad Company, which would be the surviving corporation under the plan of merger;
Commission or ICC—the Interstate Commerce Commission.

terstate Commerce Act, 54 Stat. 905, 908, 49 U.S.C. § 5 (2) (a), (2)(b), (2)(c), (2)(f) and (11); and in the National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding Section 1. The relevant provisions of the antitrust laws are contained in Sections 7 and 11 of the Clayton Act, 38 Stat. 731, 734, 64 Stat. 1125, 15 U.S.C. §§ 18 and 21, and in Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1 and 2. The texts of these provisions are set out in FEC Appendix D, FEC App. pp. 71a-82a.

QUESTIONS PRESENTED

1. Whether the Commission, in approving the proposed merger, applied proper legal standards for accommodating Section 5(2) of the Interstate Commerce Act with the antitrust legislation and rested its conclusion on adequate findings based on substantial evidence.

2. Whether the Commission fulfilled its obligation to "estimate the scope and appraise the effects of the curtailment of competition" that would result from the merger, particularly with respect to the monopoly the merger would create in central and western Florida in the transportation of the long-haul, bulk-loading commodities that account for some 75 per cent of the combined business of the merger applicants.

3. Whether the Commission fulfilled its obligation to compile an adequate record concerning the anticompetitive effects of the merger, and whether the court below erred in considering that, although such a record admittedly had not been compiled, the Commission's approval of the merger should not be disturbed.

4. Whether the Commission applied proper legal standards and made adequate findings in refusing to condition its approval of the merger on the sale or lease to another railroad of one of the merged carrier's lines of track running into central and western Florida, when such a condition would have preserved competition and avoided the monopoly that would otherwise result from the merger.

5. Whether the Commission applied proper legal standards and made adequate findings in refusing to condition its approval of the merger on divestiture by the merged company of its controlling interest in the Louisville & Nashville Railroad, in view of the substantial amount of traffic interchanged with the L & N or its competitors and the plan of the merged company to have itself and the L & N favor each other, in preference to competing railroads, in allocating that interchange traffic.

STATEMENT

1. The Merger Applicants and the Proposed Merger

Seaboard and Coast Line, the merger applicants, are two of the three major railroads in the southeastern United States.[2] They are both healthy and prosperous. (320 I.C.C. at 146, 149.)[3] During the years 1955 to 1962, Seaboard had annual revenues averaging $160.3 million and annual net income averaging $16.4 million.

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[2] The third is appellant Southern. The L & N, controlled by Coast Line, and to be controlled by the merged company under the plan approved by the Commission, is a fourth major railroad operating in the southeast, as well as in other parts of the country.

[3] Among the nation's class I railroads, Seaboard and Coast Line in 1961 ranked 9th and 12th, respectively, in total net railway operating income, and 5th and 9th in income per mile of road. Ex. H-234.

Coast Line had annual revenues averaging $165.7 million and annual net income averaging $11.3 million. (*Id.* at 148-149, 257-265.) The tonnage and revenues of both railroads from the transportation of their principal commodities have been increasing significantly.[4] Both roads operate in the six-state area of Virginia, North and South Carolina, Georgia, Alabama, and Florida, where they serve many points in common and compete for the same types of business. Within this area, according to their own evidence, they compete with each other for 33.4 per cent of their combined tonnage traffic, producing about 48.5 per cent of their combined revenues. (320 I.C.C. at 164; Ex. H-66; Ex. H-68.) In other words, the two railroads are alternate competitive choices each year for an aggregate of 865,934 cars of freight, yielding revenues of $131 million. (320 I.C.C. at 163-164.) Such is the extent of the competition that would be eliminated by the merger in the six-state area.

The merged company would be by far the largest railroad in that area, operating more than 54 per cent of the total railroad mileage. (Southern, its nearest competitor, would have about 34 per cent.) (320 I.C.C. at 163.) The merged company would have assets exceeding one billion dollars; annual operating revenues (based on the 1955-1962 average) of $326 million; and annual net income of $27.7 million. (*Id.* at 146-149, 254.)

In Florida, the merged carrier would operate approximately 81 per cent of the total railroad mileage.

---

[4] Between 1946 and 1959, carriage of the applicants' nine principal commodities (in tonnage terms) rose by 100 per cent in volume and by more than 150 per cent in revenues. 320 I.C.C. at 232.

(320 I.C.C. at 163.) The second largest railroad in the state would be the Florida East Coast, with about 13 per cent.

A special situation would prevail in the central and western portions of Florida. Here Seaboard and Coast Line are the only railroads; here the merger would eliminate all rail competition and create a monopoly. (320 I.C.C. at 164-165.) This is a singularly large, growing, and freight-productive area. Its rate of economic growth exceeds that of Florida as a whole, which in turn exceeds that of any other state in the Southeast and perhaps any other state in the Nation. (Ex. H-155, *e.g.*, pp. 156-165.) The area is especially significant as a market for rail transportation. It accounts for at least 35 per cent (Ex. H-36, Statement T; Ex. H-38) and probably much more (the record does not indicate how much) of the combined freight tonnage of the applicants. It is a principal source, and probably *the* principal source, of the nine commodities that account for more than 75 per cent of the applicant's combined tonnage and some 45 per cent of their combined freight revenues. (Ex. H-38; Ex. H-155.) These are heavy, bulk, long-haul commodities as to which, in the words of the District Court (FEC App. p. 20a), "railroads enjoy a decided economic advantage over all other modes of transport." Such is the area in which the merged carrier would have a monopoly of rail transportation.

2. The Commission Proceedings and Report

In the proceedings before the Commission, the proposed merger was opposed by a variety of interests, including the Department of Justice and other public agencies, competing railroads such as appellant Southern, railway labor, shippers, and others. Although

there were differences in emphasis and approach, the opposition focused chiefly on the widespread elimination and curtailment of rail competition, and the consequent adverse effects on the public interest, that the merger would produce.

While Southern participated in these broadly based objections, its opposition was directed principally at the severe anticompetitive effect the merger would have in central and western Florida. Southern opposed the merger unless it were conditioned on a requirement that the merged carrier lease or sell to Southern or some other qualified railroad, on reasonable terms, one of the merged carrier's several lines of track running into central and western Florida from Jacksonville and the north. Such a condition, by enabling the preservation of rail competition and avoidance of monopoly in central and western Florida, would have disarmed one of the principal public-interest objections to the merger.

Southern took the position also that the merger could not properly be approved unless conditioned on a requirement that the merged company divest itself of its controlling interest in the Louisville & Nashville Railroad. This position was based on evidence from the merged company's own potential officers that the company intended to exploit its control of the L & N (as Coast Line, which presently controls the L & N, has done) to bring about reciprocal favoritism in allocating the large volume of interchange traffic between the area to be served by the merged carrier and the territory to the west served by the L & N.[5]

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[5] Statement M, pp. 11, 13, 20; Statement A, p. 31; Statement B, p. 30; Ex. H-21, pp. 11-12; Tr. 17, 474, 550-551, 1286-1287.

The Commission, in a majority report by Commissioner Murphy over the dissents of Commissioners Webb and Tucker, approved the merger with certain conditions and rejected both of these conditions proposed by Southern.

The Commission recognized that the applicant railroads "have enjoyed a moderate degree of prosperty over the past several years" and are "currently in a relatively healthy condition"; that their earnings record is "impressive"; and that their rate of return on investment is "above the average norm for class I railroads." (320 I.C.C. at 146, 149.) The Commission recognized that the merger would eliminate competition between the applicants on the 33.4 per cent of their combined freight tonnage, yielding annual revenues of $131 million, for which they presently compete. (*Id.* at 163-164.) It emphasized, however, that 19.7 per cent of the combined tonnage "would remain competitive with other railroads after the merger" (*id.* at 163, 164), so that rail competition would be totally eliminated on only "about 13.7 percent of the total combined freight tonnage." (*Id.* at 164.) Using the latter amount, the Commission stated (in its only "market share" estimate) that

> "only 1.2 percent of the total intercity freight traffic from all modes of transport would cease to be subject to rail competition in the southern religion after the merger, leaving more than 98 per cent of the total intercity freight traffic unaffected by the merger." (*Id.* at 164; see also *id.* at 211.)

The Commission discussed the anticompetitive effects of the merger generally in terms of "all modes of transport" and in terms of the "southern region"

or the "Southeast." Thus, it spoke of "the over-all competitive picture in the southeastern region" (320 I.C.C. at 166), and stated:

> "The impact of this merger, both good and bad, will be felt throughout the southern region and in evaluating its competitive advantages and disadvantages, we must consider the rail service provided by all rail carriers and, in fact, the sum of all of the competitive transportation facilities that will remain available in this broad area." (*Id.* at 166.)[6]

The Commission recognized that the situation "in the central and western portions of Florida is unique" in that no other railroad serves that area. (320 I.C.C. at 164.) The Commission then described the existing situation in that area as "imperfect monopoly" (*id.* at 164-165), and found that the loss of competition there as a result of the merger "is largely a matter of degree," inasmuch as rail monopoly "would merely supplant the duopoly which has long existed there . . . ." (*Id.* at 165.)[7] The Commission recognized that "there will be a significant reduction in rail competition in Florida" (*id.* at 166), but asserted that "the over-all reduction in rail competition in the Southeastern States viewed as a whole will be relatively moderate . . ." (*id.* at 166), and was able to "conclude and specifically find" that "the reduction of rail competition caused by the proposed merger will not be substantial." (*Id.* at 167.)

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[6] See also, *e.g.*, 320 I.C.C. at 212: "the region served by the applicants."

[7] This statement, unexplained by the Commission, was interpreted as follows by the court below: "The Commission appears to have assumed that the equivalent of a conspiracy to fix prices in Florida already exists." (FEC App. pp. 23a-24a.)

As already indicated, the Commission heavily emphasized intermodal competition in the transport industries, and did so to the near-exclusion of any consideration of intramodal rail competition. The Commission stated, for example, that "the necessity for the preservation of intramodal rail competition has gradually lost much of its significance." (320 I.C.C. at 210; see also *id.* at 166.) While stressing intermodal competition, the Commission at no point found that such competition is significantly applicable to the bulk, long-haul commodities that account for most of the applicants' freight tonnage and that originate and terminate largely in central and western Florida where the merger would create a monopoly. Of the nine bulk-loading commodities that represent more than 75 per cent of the applicants' combined tonnage (*id.* at 231-232; FEC App. p. 23a n. 30), the Commission took note of only one. This was phosphate rock, the No. 1 commodity in tonnage terms for each of the applicants; the Commission described it as "essentially a commodity normally handled by rail." (320 I.C.C. at 151.)

Concluding to approve the merger, the Commission found that the benefits that would assertedly result, "foremost" among which were savings of some $20 million a year to the merged carrier through "elimination of duplicate facilities and functions" (320 I.C.C. at 206-207), would outweigh the anticompetitive effects. (*Id.* at 167.) In so concluding it relied on the premise that "primary emphasis must be placed upon the public advantages that will accrue from the merger . . . ." (*Ibid.*; see pp. 24-25 *infra*.) So far as the anticompetitive effects were concerned, the Commission found, as noted above, that they "will not be substantial." (*Id.* at

167). And, as will be shown below (pp. 28-38), it did not estimate the scope or appraise the effects of the rail monopoly that would be created in central and western Florida.

With respect to the conditions to be imposed on approval of the merger, the Commission made clear that it had considered this question with regard, not to central and western Florida, but to "the competitive situation in the Southeast." (320 I.C.C. at 188; see also *id.* at 184.) The Commission said its objective in selecting the conditions was to "establish two balanced competitive systems in that area" (*id.* at 188) and to "create more balanced competition among the several rail carriers in the southeastern seaboard area, and thus benefit the public generally." (*Id.* at 184.) Yet the Commission rejected the track-transfer condition proposed by Southern which would have preserved two-carrier rail competition in central and western Florida. It did so on the ground that such a transfer would result in "an invasion of territory now adequately served by the applicants" (*id.* at 187), and "would deprive the merged company of substantial revenues." (*Ibid;* see also *id.* at 209).

The proposed condition requiring the merged company to divest itself of control of the L & N was also rejected. The Commission based this ruling in large part on its expectation that competitors of the L & N would be able to retaliate against the merged company for any preference it might give the L & N. (320 I.C.C. at 188-189:) The standard the Commission applied in determining to deny this condition (and the track-transfer condition as well) turned on whether the proposed requirement was "necessary in the public interest." (*Id.* at 189; see also *id.* at 209.)

3. The First District Court Decision and This Court's Disposition Thereof

The District Court, on its first review of the Commission's orders approving the merger, set them aside. (242 F. Supp. 14 (M.D. Fla. 1965); FEC App. C, pp. 54a-70a.) It did so on the ground that "the Commission is required to decide whether or not section 7 of the Clayton Act would be violated by the proposed merger." (242 F. Supp. at 20; FEC App. p. 62a.) On appeal, this Court, in a *per curiam* opinion, summarily vacated the District Court's judgment and remanded the case there. (382 U.S. 154 (1965); FEC App. B, pp. 51a-53a.) The Court reiterated its statements in *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80, 87 (1944), and *Minneapolis & St. L. RR. Co.* v. *United States*, 361 U.S. 173, 186 (1959), that the Commission is "obligated to estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition]" so as to achieve the "accommodation of § 5(2) and the antitrust legislation." (382 U.S. at 156; FEC App. p. 53a.) The Court then stated:

> "The same criteria should be applied here to the proposed merger. It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be 'consistent with the public interest'." (382 U.S. at 156-157; FEC App. p. 53a.)

Stating that "whether the Commission has confined itself within the statutory limits upon its discretion and has based its findings on substantial evidence are questions for the trial court in the first instance," the Court

vacated the judgment and remanded the case to the District Court "for a full review of the administrative order and findings pursuant to the standards enunciated by this Court." (382 U.S. at 157; FEC App. p. 53a.)

The Solicitor General of the United States had suggested that course. In so suggesting he pointed out, in a Memorandum filed with the Court, that he did "not contend that the Commission's analysis of competitive effects was adequate." On the contrary, he explained, "The Department of Justice urged below that, tested by proper criteria, the Commission's findings in this case were *not* adequate, and we would renew that contention on a remand." (Memorandum for the United States, Nos 425 and 555, October Term, 1965, pp. 4-5 (emphasis in original).) The Solicitor General called attention "emphatically" to

> "the need for adequate standards in the appraisal of the competitive effects of rail mergers—standards drawn not merely from the Commission's specialized knowledge of railroad and transportation conditions and practices, but from sound economic principles of competition and from the experience of the courts in analyzing anticompetitive consequences of mergers under the antitrust laws . . . ." (*Id.* p. 7; see also *id.* p. 9.)

4. The District Court's Decision Now Being Appealed

The District Court, on remand, has now upheld the Commission's approval of the merger. (FEC App. pp. 1a-50a.)

The court stated that it had "absolutely no doubt that, judged by the standards of the antitrust laws, the instant merger would fail at least as to Florida." (FEC App. p. 24a.) Presumably for this reason, the

court described the case as presenting "a head-on collision between the antitrust laws and the Interstate Commerce Act." (*Id.* p. 4a) The court apparently read this Court's *per curiam* opinion as holding that antitrust market-definition tools have no proper role in a railroad merger case, inasmuch as the Commission is not required to take the ultimate step of concluding whether or not the merger would violate the antitrust laws.[8]

The court recognized the importance of the impact the merger would have in Florida. It stated that "these railroads receive a substantial increment of their revenue from traffic originating in Florida," and that "It is precisely on this traffic that the monopoly created by the merger will have its greatest impact." (FEC App. p. 23a.) The court read the Commission's report as having assumed "that the equivalent of a conspiracy to fix prices in Florida already exists," and expressed the view that intramodal competition, even as to rates, is still an important factor in the railroad industry. (*Id.* pp. 23a-24a.) The court then pointed out that *Northern Securities Co.* v. *United States,* 193 U.S. 197 (1904), "may be viewed as advancing the proposition that a merger to solidify a conspiracy is illegal under the antitrust laws." (FEC App. p. 24a.) At this point the court expressed its confident view, as quoted above, that under the anti-

[8] "It seems pointless to say that the Commission must employ market definition tools calculated to show whether an antitrust violation has taken place, and when it reaches the point where a conclusion may be properly drawn, it may then stop since it need not draw any conclusions. But this illogical mode of behavior would be the result of following both the plaintiff's rationale and the Supreme Court's recent opinion in this case." (FEC App. pp. 13a-14a.)

trust laws "the instant merger would fail at least as to Florida." (*Ibid.*)

The court took note of the ICC report, approving a motor-carrier merger under Section 5(2), which this Court upheld in the *McLean* case, *supra*, 321 U.S. 67. The court pointed out that that case differed from the present one because of "the substantial competition that remained after the merger" in that case, and noted that the Commission there had "analyzed the remaining competition . . . in great detail." (FEC App. pp. 31a-32a.) In the present case, the court found:

> ". . . the Commission looked at and weighed all the factors it had examined in [McLean] . . . . The ICC considered those areas in Florida where a monopoly would be created, including the size of the cities involved and their relative importance." (*Id.* p. 35a.)[9]

With respect to phosphate rock and the other eight bulk-loading commodities that account for some 75 per cent of the applicants' tonnage, the court held clearly that these are rail-oriented commodities substantially insulated from intermodal competition:

> "It is, we think, accurate to say that railroads enjoy a decided economic advantage over all other

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[9] The court was mistaken. The Commission noted that the population of Tampa exceeds 200,000 (320 I.C.C. at 164), but did not otherwise consider the "size" or "relative importance," or even the names, of cities in those areas in Florida where a monopoly would be created. It did refer to the average population of "17 communities *outside of Florida* which would be without competitive rail service after the merger," and to the percentage of the population of *"the 6-State area"* comprised in the 88 counties in that area which would be without such service. (320 I.C.C. at 164 (emphasis added).)

modes of transport on heavy, long, bulk-haul products in central and western Florida." (FEC App. p. 20a; see also *id.* pp. 18a-19a.)

The court several times expressed its dissatisfaction with the record made before the Commission, particularly as it related to the anticompetitive effects the merger would have in central and western Florida. (FEC App. pp. 19a, 20a, 23a n. 30, 41a n. 36.) The court was content, however, to place the blame for this on the parties, particularly the Department of Justice. (*Id.* pp. 36a, 38a-39a, 41a n. 36.) The court thus did not consider whether the case should be remanded so that the Commission might remedy the inadequacies of the record.

Citing this Court's opinion in *McLean, supra,* 321 U.S. at 76, the court agreed with the Commission that Congress had directed the ICC to give "primary weight" to the four factors listed in Section 5(2)(c) of the Interstate Commerce Act, which do not in terms include the factor of antitrust policy. (FEC App. p. 37a.)[10] The court determined that the ICC here "has clearly realized the danger zones in this merger and after analyzing the problem has chosen what it concludes to be more important public benefits," and that the record supports the Commission's findings, adding:

> "The greatest problem that we have experienced is that none of the plaintiffs in this case chose to build a record before the Commission on which to support their contentions." (*Id.* p. 38a.)

[10] What this Court said at the cited page in *McLean,* quoting the statute, was that the Commission is required to "give weight" to those four factors, "among others." (321 U.S. at 76; 49 U.S.C. § 5(2)(c).)

The court concluded that the Commission's orders must be sustained because it had applied the proper standards, "exhibited . . . familiarity with the complex problems in the transportation industry," and "explained its reasoning and supported its application of that reasoning by substantial evidence." (FEC App. p. 50a.) At no point did the court find or conclude that the Commission, in considering the anti-competitive effects of the merger, had made adequate findings.[11]

THE QUESTIONS ARE SUBSTANTIAL

This is the first of the current wave of great railroad-merger cases to be decided by the ICC and presented to this Court. As stated by the Solicitor General upon the previous hearing, it involves "a proposed merger of great magnitude and far-reaching implications for the future structure of the railroad industry."[12] Waiting in line behind this case are, in the words of ICC Commissioner Webb, "pending consolidation cases involving practically all of the large class I railroads in this Nation."[13] The magnitude of the merger and the precedential nature of the case would themselves be more than enough to warrant plenary review by this Court, so as to assure that the Commission in approving the merger had applied correct standards, made adequate findings, and compiled a complete record.

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[11] The court did not discuss either of the proposed conditions which Southern contended that the Commission had wrongly denied. The court stated, however, that it had considered "the arguments which we have discussed and all other arguments in this case." (FEC App. p. 50a.)

[12] Memorandum for the United States in Nos. 425 and 555, October Term, 1965, p. 6.

[13] 320 I.C.C. at 218 (dissenting opinion).

But that is not all. The legal question here presented —the "accommodation" of Section 5(2) of the Interstate Commerce Act and the antitrust legislation—is especially substantial in this case because the impact of antitrust considerations is especially strong. In the District Court's view, the case presents "a head-on collision between the antitrust laws and the Interstate Commerce Act" (FEC App. p. 4a), inasmuch as the court had "absolutely no doubt that, judged by the standards of the antitrust laws, the instant merger would fail at least as to Florida." *Id.* p. 24a; see also *id.* p. 29a.

The anticompetitive effects of the merger are by any account very substantial. Competition would be eliminated between the applicants on more than one-third of their combined traffic, and an absolute rail monopoly would be created in a singularly large, growing, freight-productive, and rail-oriented market. As Commissioner Webb said in dissent, "This is the first case in the current series of proposed railroad unifications in which a vast amount of beneficial competition between applicants would be eliminated." 320 I.C.C. at 218. It is surely appropriate in such a case for this Court to review in plenary fashion the accommodation the ICC has made between the antitrust laws and the Interstate Commerce Act, and the account it has taken of the national antitrust policy of the United States.

On two previous occasions since 1940, when Section 5(2) was amended to its present form, this Court has been asked to review the Commission's approval of a merger under that section. In both cases the Court accepted the appeal for plenary review. *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944);

Minneapolis & St. L. RR. Co. v. *United States*, 361 U.S. 173 (1959). The question presented by the instant appeal is unquestionably more substantial, in both legal and economic terms, than the question in either of those cases.[14]

Finally, plenary review of the Commission's approval of the merger in this case is in order because, as we shall proceed to show, that approval should not be allowed to stand. The Commission applied erroneous standards for determining whether the merger was in the public interest—standards misconstruing and disparaging the antitrust policy of the United States. The Commission made inadequate findings, and thus did not fulfill its obligation to "estimate the scope and appraise the effects of the curtailment of competition" that would result from the merger. The Commission failed, as the District Court recognized, to compile a complete record with respect to the anticompetitive effects of the merger. The Commission applied erroneous standards and made inadequate findings in refusing to attach certain conditions if it was to approve the plan at all. And the Commission erred in giving its approval without such conditions because, on this record,

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[14] The question in *Minneapolis* was which of several railroads should be allowed to acquire a small "bridge carrier" whose owners were determined to sell. See, *e.g.*, 361 U.S. at 178. *McLean* was not a railroad but a motor-carrier case. While the end-to-end consolidation there approved was relatively large—combined assets of $8 million and annual revenues of $19 million (321 U.S. at 71)—it was not in a class with this case. Moreover, as the District Court here pointed out, the anticompetitive effects in *McLean* were not nearly so severe as they are here: ". . . [S]evere 'elimination of competition,' such as here involved[,] . . . distinguishes the *Associated-McLean* case, *supra*, where substantial competition remained." FEC App. p. 36a; see also *id.* pp. 31a-32a.

the expected public benefits from the merger could not properly be found to outweigh the massive destruction of beneficial competition.

1. The Commission's Erroneous, Competition-Disparaging Standard.

The Commission's order will be set aside by this Court if "the standards and criteria employed by the Commission were not the proper ones . . . ." *ICC* v. *J-T Transport Co.*, 368 U.S. 81, 93 (1961). Specifically, when this Court reviews an ICC order approving a merger under Section 5(2), two principal issues are "the propriety of the standards applied and whether due consideration was given to the antitrust laws and policies . . . ." *McLean Trucking Co.* v. *United States, supra,* 321 U.S. at 77.

In this case the standards and criteria employed by the Commission were not the proper ones, and due consideration was not given to the antitrust laws and policies.

The proper standard was set forth by this Court in its *per curiam* opinion on the previous appeal in this case. The Court there reiterated that the Commission's task is to "accommodate" the Interstate Commerce Act and the antitrust legislation, and that, to accomplish this, it must "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition]." 382 U.S. at 156; FEC App. pp 52a-53a. The Court also described "the ultimate question" in this case as "whether the merger would be consistent with the public interest despite the foreseeable injury to competition." *Ibid.* Under this standard, as the District Court recognized, "There is and could be no dispute that, in determining whether a

given merger is in the public interest, the Commission should take into account the national antitrust policy of the United States." (FEC App. p. 11a.)

What is "the national antitrust policy of the United States"? As the District Court observed, its essence was clearly stated by this Court in *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1 (1958). The Court there pointed to

> "... the premise that unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress ...." *Id.* at 4; quoted by the District Court at FEC App. p. 12a.

It is clear enough why the ICC is obliged to give weight to this policy in making its "public interest" determination under Section 5(2). Apart from the "among others" provision in Section 5(2)(c), competition contributes to the "adequate transportation service to the public" which is the first of the four factors expressly listed in that subsection. Moreover, competition furthers the National Transportation Policy in its objective "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers ...." 49 U.S.C. preceding § 1.[15]

The Commission in this case, however, took the position that competition is something apart from and opposed to a sound transportation policy. This point of view animates and pervades the report. The Commis-

[15] As Commissioner Webb observed here in dissent, the past 20 years of antitrust law and policy have seen a "growing realization that the public interest standards of regulation and faith in competition are more often compatible than antithetical." 320 I.C.C. at 216.

sion's premise, for example, was that its task required it to resolve "the *conflicting* considerations of section 5(2) of the act and the antitrust legislation" (320 I.C.C. at 167)—"the numerous *conflicting* considerations that are *inevitably* involved." *Id.* at 206 (emphasis added). The Commission either ignored or disagreed with this Court's view that it is possible, and obligatory, to *accommodate* the two policies.[16]

The Commission's view led it to disparage competition as an element of the public interest and to employ a standard avowedly biased in favor of approving the merger. This is seen in the Commission's candid statement of its guiding criterion:

> "In resolving the conflicting considerations of section 5(2) of the act and the antitrust legislation, primary emphasis must be placed upon the public advantages that will accrue from the merger, including improved services, safer operations, lower costs, and other potential benefits that further the objectives of the national transportation policy." 320 I.C.C. at 167

By placing "primary emphasis" on the public advantages expected to accrue "from the merger," and ignoring the fact that the benefits of competition also "further the objectives of the national transportation

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[16] On April 27, 1966, after argument of this case in the District Court, the Commission announced its decision in the *Great Northern-Northern Pacific* merger proceeding, Finance Docket No. 21478, —— I.C.C. ——, decided March 31, 1966 (mimeograph opinion). There, on facts quite comparable to those presented here, the Commission disapproved a merger between prosperous and substantially parallel railroads. In so doing the Commission expressly recognized what it here ignored—that it "is not permitted to depreciate the values of competition which are reflected in the financial health of the merger applicants and in adequate transportation service to the public." Mimeograph opinion, p. 92; see also *id.* pp. 58, 88, 91, 97-98.

policy," the Commission unashamedly weighted the scales in favor of the merger and against competition. [17]

In *ICC v. J-T Transport Co., supra,* 368 U.S. 81, the Commission's order was set aside because the Commission had "loaded one of the scales" and "indulged in a presumption" in favor of one statutory criterion at the expense of another to which Congress had directed it to give equal weight. 368 U.S. at 88-90. The Commission here has done precisely the same thing.

The Commission's unwonted disparagement of competition manifests itself in various forms throughout the report. The Commission relied, for example, on the proposition that "excessive competition between carriers may well result in serious injury to shippers as well as to the public generally." 320 I.C.C. at 167. Yet it made no findings, and on this record could have made none, that the existing competition between Seaboard and Coast Line is in fact "excessive" or injurious to shippers or the public. [18]

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[17] In the *Great Northern-Northern Pacific* case, see p. 24 n. 16 *supra,* the Commission repudiated this approach. The examiner in that proceeding had erred, the Commission held, in believing "that the Transportation Act of 1940 continued the policy of favoring railroad mergers . . . .":

> "No such policy is expressed in section 5. To interpret section 5 as implying such a policy is a perversion of legislative history and intent. The public interest scale is balanced. It is not to be tipped by the slightest presumption for or against merger." Mimeograph opinion, p. 89.

[18] The facts and report in this case contrast significantly in this respect with the proceeding in which the Commission, on April 6, 1966 (announced April 27, 1966) approved the merger of the *Pennsylvania* and *New York Central* railroads. 327 I.C.C. 475. There the Commission made and relied on specific findings that competition between the applicants was excessive, inconsistent with their own financial health, and injurious to the public. 327 I.C.C. at, *e.g.*, 506, 512, 519.

The Commission further took the position that the regulated nature of the railroad industry leaves little if any role for intramodal competition.[19] It stated that railroads and public utilities "are subject to equally stringent regulation" (320 I.C.C. at 167), and justified its approval of the merger by citing this Court's statement in *McLean*, 321 U.S. at 85, that the regulatory process provides "an effective safeguard against the evils attending monopoly . . . ." 320 I.C.C. at 212. When this court made that statement in *McLean*, it was referring to regulation as a factor that *Congress* "presumably took into account" when it "relieved participants in appropriate mergers from the requirements of those [antitrust] laws." 321 U.S. at 85. It was not authorizing the Commission to invoke regulation as a basis for discounting the value of competition a second time in determining whether or not a merger was "appropriate."

The Commission also made inadequate findings as to the existence and nature of competition between railroads. While railroads are indeed regulated, as are the "gas, electric, and telephone utilities" to which the Commission assimilated them, they are not, of course, subject to "equally stringent regulation." Competition exists among railroads, as it does not among those necessarily monopolistic utilities; it exists, moreover, with respect not only to service but to rates. The Dis-

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[19] Fulda, *Antitrust Aspects of Recent Transportation Mergers*, 48 Minn. L. Rev. 723, 739-40 (1964), comments as follows on the Commission's decision in this case:

> "'. . . intra-mode rail competition is generally belittled as irrelevant, it is practically ended in Florida, and in the other areas involved it is weakened to an unprecedented degree.'"

trict Court, unlike the Commission, recognized this.[20] In the *Great Northern-Northern Pacific* case (see p. 24 n. 16 *supra*), the Commission did too. In contrast to its performance here, it there recognized, described, and attributed important value to the competition engaged in by two railroads serving the same area.[21]

This Court was fully aware that railroads are a regulated industry when it held, in *McLean* and *Minneapolis* and its *per curiam* opinion in this case, that the Commission must "estimate the scope and appraise the effects of the curtailment of competition," and must give them weight in determining whether the merger should be approved. In this case, by using regulation as an excuse to ignore and discount competition between railroads, the Commission exceeded the bounds of its discretion.

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[20] ". . . The Reed-Bulwinkle Act explicitly exempts rate agreements and rate bureau accords approved by the ICC from the antitrust laws. 49 U.S.C.A. § 5b.

"For our purposes, it is important to remember that the Reed-Bulwinkle Act preserves the potential of competition since individual railroad initiative is a legal requirement. If the instant merger is permitted, then that initiative will be irrevocably lost. . . ." FEC App. p. 24a.

[21] "Although regulation imposes certain constraints upon intramodal rail competition, competitive ratemaking is far from dormant. Subject to the requirements of the Act, there is a broad zone of reasonableness within which the discretion of carrier management and the interplay of competitive forces operate. . . ." Mimeograph opinion, p. 81.

". . . the anticompetitive consequences of the merger would not be confined to stations where applicants are directly competitive. Today, rate innovations and service improvements by one of the applicants create strong pressure from shippers for similar treatment by the other. These indirect benefits of competition between the Northern Lines cannot be measured statistically but they are real." *Id.* p. 83.

2. The Failure to Make Adequate Findings on the Scope and Effects of the Curtailment of Competition.

The Commission was obliged "to estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition]." 382 U.S. at 156; FEC App. pp. 52a-53a. The Commission was also obliged to make adequate findings on this issue. As this Court said in remanding this case to the District Court, the Commission is authorized to approve the merger "*if it makes adequate findings* in accordance with the criteria quoted above that such a merger would be consistent with the public interest." 382 U.S. at 157; FEC App. p. 53a (emphasis added). See also *McLean, supra,* 321 U.S. at 88; *Minneapolis, supra,* 361 U.S. at 189; Administrative Procedure Act, Section 8(b), 5 U.S.C. § 107(b).[22]

The Commission in this case did not estimate the scope and appraise the effects of the curtailment of competition that would result from the merger. It did not make adequate findings as to the anticompetitive effects of the merger.

The Commission misconstrued even the basic meaning of the "curtailment of competition" whose scope it had to estimate and whose effects it had to appraise. As noted at p. 10 *supra,* the Commission recognized that "33.4 percent of their total tonnage was competitive between these applicants." 320 I.C.C. at 164. But because "19.7 percent of their total tonnage would remain competitive with other railroads after the merger" (*ibid.*), the Commission dismissed this 19.7 per

[22] See also, *e.g., Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168 (1962); *ICC* v. *J-T Transport Co.,* 368 U.S. 81, 93 (1961).

cent from further consideration, and concerned itself only with the 13.7 per cent of the applicants' tonnage that would be totally foreclosed from rail competition. Using this figure as the measure of the competition "eliminated by the merger," the Commission was able to make its pivotal and lonely finding that the competition eliminated would amount to "only 1.2 percent of the total intercity freight traffic from all modes of transport" in the "southern region." 320 I.C.C. at 164.

The Commission thus proceeded on the theory that competition is "curtailed," within the meaning of this Court's directive, only when it is totally abolished, and not when it is reduced to however substantial a degree. As the dissenting Commissioners pointed out, "If this idea were pressed to its logical conclusion, no rail merger could offend the policy of the antitrust laws so long as two competitors remained in the relevant market." 320 I.C.C. at 229. That such an approach does not comply with this Court's directive is made clear by the *McLean* and *Minneapolis* cases. In both, this Court, in approving the Commission's competitive analysis, specifically pointed out that the Commission had considered the extent to which competition would be "diminished" by the merger. *McLean,* 321 U.S. at 88; *Minneapolis,* 361 U.S. at 188.[23]

The Commission's competitive findings were inadequate also because of its failure to estimate the scope

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[23] The Commission in the recent *Great Northern* case, see p. 24 n. 16 *supra,* recognized the error of its approach here:

> ". . . Nor may we limit our consideration of the traffic to that which . . . is 'exclusively competitive.' No such limitation is contained in the law. We must consider all traffic for which these lines compete and as to which their competition will be eliminated." Mimeograph opinion, p. 92.

and appraise the effects of the curtailment of competition with respect to central and western Florida—the important economic area where a monopoly would be created—and with respect to the bulk commodities that originate or terminate there and account for a dominant part of the applicants' tonnage.

The Commission has conceded that it was obliged to give separate consideration to the anticompetitive effects the merger would have in central and western Florida.[24] The obligation was not met. The Commission did not make adequate findings as to the anticompetitive effects in this area simply by stating that there would be a "monopoly" and a "significant reduction in rail competition in Florida," and that the monopoly would merely supplant the existing "duopoly." FEC App. pp. 21a, 24a. To "estimate the scope" and "appraise the effects" of the curtailment of competition, the Commission was required to go beyond vague

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[24] Commission counsel in their brief on remand in the District Court stated:

> "The East Coast and those allied with it make much of the fact that Florida and more particularly the central and western portions of that State comprise an area worthy of the Commission's separate consideration in its appraisal of the anticompetitive effects of the proposed merger—as they phrase it, a separate, relevant geographic market or sub-market. *We would concede that it is,* but we would also insist that the Commission did indeed determine what the anticompetitive effects of the considered transaction would be in that area." Supplemental Brief of the ICC, p. 15 (emphasis added).

The District Court evidently agreed, stating:

> ". . . these railroads receive a substantial increment of their revenue from traffic originating in Florida. It is precisely on this traffic that the monopoly created by the merger will have its greatest impact." FEC App. p. 23a; see also *id.* pp. 18a-19a, 24a.

terms and make some measurement—to say "how much." See *Michigan Consolidated Gas Co.* v. *FPC*, 283 F. 2d 204, 218 (D.C. Cir. 1960).[25] It was required, for example, to consider, and show that it had considered, the *size* of the "monopoly"; it was required to indicate the extent of the "significant" reduction.

The need to use quantitative terms in "estimating the scope" of the curtailment of competition was recognized by the Commission with respect to the entire "southern region," where it produced the figure of 1.2 per cent of the total intercity freight traffic. 320 I.C.C. at 163-64. With respect to central and western Florida, however, the Commission made no "estimate."[26] On the most basic question of all, it made no finding, even in asolute terms, as to the amount of traffic carried by the applicants, and hence the amount

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[25] See also *Saginaw Broadcasting Co.* v. *FCC*, 96 F.2d 554, 563 (D.C. Cir.), *cert. denied*, 305 U.S. 613 (1938); *Democrat Printing Co.* v. *FCC*, 202 F.2d 298, 302 (D.C. Cir. 1952); *American Broadcasting Co.* v. *FCC*, 179 F.2d 437, 444-45 (D.C. Cir. 1949).

[26] Compare the *Great Northern* case, p. 24 n. 16 *supra*, where the Commission, noting its obligation "to measure the competitive impact of the proposed merger in terms of the most relevant areas and the principal types of commodities transported" (Mimeograph opinion, p. 82), identified the area "where vigorous intramodal competition exists and is threatened" (*id.* p. 76), and then measured the traffic for which competition would be curtailed in that area as a percentage of the applicants' total tonnage and revenue. *Id.* p. 83.

The District Court here, in its desire to credit the Commission with some quantitative analysis of the monopoly area, stated that the Commission had considered "the size of the cities involved and their relative importance." FEC App. p. 35a. However, as pointed out at p. 17 n. 9 *supra*, the court was mistaken.

of competition to be eliminated, in that area.[27] Indeed, as the District Court admitted, the record made such a finding impossible:

> "The record does not show what portions of the merging companies' revenues or profits are generated by the carriage of long-haul bulk products originating in Central and Western Florida." FEC App. p. 23a n. 30.

Nor does the record support, or the report contain, estimates or appraisals of the curtailment of rail competition in central and western Florida in relation to the total freight moved by all modes in that area, in relation to the total amount of competition that would be foreclosed by the merger in all areas, or in relation to anything else.[28]

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[27] The Commission did produce, but only for Florida as a whole, a count of stations at which Seaboard and Coast Line both maintain agents, and concluded therefrom that "the number of Florida points at which there has been no competition is about 4 times as great as the number of Florida points at which Seaboard and Coast Line have heretofore competed." 320 I.C.C. at 165. Apart from the unsupported assumption that the applicants compete only at points where both maintain agents (compare *Great Northern*, p. 83, quoted at p. 27 n. 21 *supra*), and apart from the statute's concern with competition to be eliminated rather than competition already lacking (see *Great Northern*, p. 92), another fatal defect in this approach was pointed out in the Commission's *Great Northern* report (p. 76):

> "Without some indication of the amount of traffic generated at stations without the . . . [relevant competitive area], the mere recitation of the number of common points at which competition will either be reduced or eliminated entirely by the unification, does not indicate whether the effect of the proposed merger on competition would be substantial or insignificant."

[28] In a further effort to read some substance into the Commission's remarks concerning Florida, the District Court apparently interpreted "duopoly" as meaning "the equivalent of a conspiracy to fix prices in Florida." FEC App. p. 24a; see p. 11

With respect to the bulk commodities that account for 75 per cent of the applicants' tonnage, the Commission has made the qualified concession that, *if* the record showed that railroad transportation of these commodities was "effectively insulated" from intermodal competition, the Commission would have been obliged to make more specific findings as to the effect of eliminating the competition between the applicants for the carriage of these commodities. The Commission argues, however, that no such obligation arose, because the record showed "massive intermodal competition" for the transport of these commodities.[29]

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n. 7 *supra*. The term is so vague that this interpretation is probably as reasonable as any. If such a conspiracy exists, however, the Commission was certainly obliged to consider the question before allowing the conspirators to merge. See the District Court's opinion (FEC App. p. 24a), citing *Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904); see p. 16 *supra*. In any event, as the Commission conceded in the District Court (Supplemental Brief of the ICC, p. 14), its order must be set aside if its findings on competition were "vague or insufficient." See *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475 (1942).

[29] Commission counsel in their brief on remand in the District Court stated:

> "If the record in this case had established that the applicant railroads' transportation of bulk commodities was effectively insulated from the competition of other modes, the Commission might have been obliged to make more specific findings of the effect of eliminating what rail competition exists in the movement of such commodities. However, the Commission is only required to determine issues posed by the record. In the absence of a showing that the applicants are immune from intermodal competition on a substantial segment of their traffic, the Commission was under no duty to analyze competitive consequences on a commodity-by-commodity basis. Here, the record clearly shows that, even in the transportation of bulk commodities, the applicant railroads experience massive intermodal competition . . . ." Supplemental Brief of the ICC, pp. 28-29.

Several conclusions follow from this. One is that the Commission does not contend that it made adequate findings as to the curtailment of rail competition in the carriage of the bulk commodities; its position is that it did not have to, because the opponents of the merger did not prove that rail transport of these commodities was insulated from intermodal competition. Another is that the Commission's order must be set aside because of the Commission's failure, *in its report,* to make the necessary (though in fact untenable) finding that the record shows carriage of these commodities to be subject to massive intermodal competition." It is well settled that "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . ." *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168-169 (1962).[30]

A third conclusion is that, on the Commission's own terms, its admitted failure to make findings as to the effect of eliminating rail competition for the carriage of the bulk commodities must now be held erroneous. For the District Court, rejecting the Commission's argument, has held that the record does show railroad carriage of these commodities to be substantially insulated from intermodal competition. The court made the following findings, among others, recognizing the ineffectiveness of intermodal competition for this carriage:

> "Railroads have a decided economic advantage in carrying long-haul, heavy bulk products, e.g., phosphate rock mined principally in the western portion of central Florida." FEC App. pp. 18a-19a.

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[30] See also, *e.g., SEC* v. *Chenery Corp.,* 318 U.S. 80, 94 (1943); *Florida* v. *United States,* 282 U.S. 194, 215 (1931).

"While railroads are able to take long bulk-haul business from trucks, barges or water carriers enjoy a considerable cost advantage over railroads. Since shipment by barge takes longer than shipment by rail, the cheaper cost is somewhat offset. The record in this case does demonstrate that barges are not physically interchangeable with railroads as a major competitive mode of phosphate transportation. Barges are not able to serve interior points on phosphate, nor are they able to serve facilities that have special equipment designed solely for loading or unloading rail shipments. See 313 I.C.C. 495 (1961) (railroads able to divert traffic from water carriers even at $1 higher rate than water transportation); 291 I.C.C. 689 (1954) (railroads able to divert traffic from water carriers even at 35 cents higher rate than water transportation). It is, we think, accurate to say that railroads enjoy a decided economic advantage over all other modes of transport on heavy, long, bulk-haul products in central and western Florida. . . ." FEC App. p. 20a. [31]

The court did not draw the necessary conclusion that the Commission's findings were inadequate. On the other hand, it never found them adequate. [32] And it made clear its view that, on the record presented, it was impossible to "estimate the scope" or "appraise the

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[31] In the *Great Northern* case, see p. 24 n. 16 *supra*, the Commission recognized that, in view of the railroads' inherent advantages in certain types of carriage, including "heavy loading, low-value bulk commodities . . .;" and in "many long-haul movements," "rail transportation must be considered a distinctive market in its own right." Mimeograph opinion, p. 73. The Commission further described rail carriage of such commodities as "substantially noncompetitive" with other modes. *Ibid.*

[32] At no point did the District Court make the necessary determination that the Commission had met its obligation to make adequate findings.

effects" of the monopoly the merger would produce in the carriage of these commodities. While emphasizing that the applicants receive a substantial portion of their revenues from traffic originating in Florida (FEC App. p. 23a), and pointing out that the transportation of nine bulk commodities accounts for some 75 per cent of their business (FEC App. 23a n. 30), the court confessed to an inability, on this record, to "assess the meaning" of a railroad's monopoly on carriage of these commodities (FEC App. p. 20a), or to "predict what action" such a monopolist would take. FEC App. pp. 19a-20a. In other words, one could not "appraise the effects" of the monopoly. The court further stated that the record failed to "show what portion of the merging companies' revenues or profits are generated by the carriage of long-haul products originating in Central and Western Florida." FEC App. p. 23a n. 30.[33] In other words, one could not "estimate the scope" of the monopoly.

In sum, the District Court affirmatively recognized that, on this record, it was not possible for the Commission to make the adequate competitive findings that this Court has directed it to make.

Commission counsel were correct in recognizing that, if the Commission had to make adequate findings as to the effect of eliminating rail competition for carriage of the bulk commodities, it did not do so. Of the nine major commodities, in terms of tonnage, handled by the applicants, which account for some 75 per cent of their combined tonnage, the Commission discussed only one. That was phosphate rock—the No. 1 tonnage

[33] The record does show, however, that only eight points in that area account for about 35 per cent of the applicants' combined total tonnage. See Ex. 36, Statement T, and Ex. 38.

commodity for each of the applicants, and a product originating predominantly within central and western Florida. The Commission said two things about phosphate rock, and they contradict each other. On one hand, the Commission described phosphate rock as "essentially a commodity normally handled by rail." 320 I.C.C. at 151. This was the finding quoted by the District Court. FEC App. p. 21a. It is also the one supported by the record, which discloses, for example, that the railroads have 93.5 per cent of the freight at the phosphate-rock center of Mulberry, and trucks only 6.5 per cent. Ex. H-36, Statement T. On the other hand, the Commission found that "The competition faced by the railroads from other modes of transport in the Tampa area is most apparent with respect to the movement of phosphate rock. . . ." 320 I.C.C. at 153.[34] It would be difficult to imagine a more clearly inadequate pair of findings than two that contradict each other.

These are the only findings the Commission made with respect to any of the principal bulk commodities for whose carriage the applicants compete in central and western Florida. There is no finding as to the amount of competition (in tonnage or revenue terms) for each or all of the nine principal commodities; no finding as to the relationship between such competition and the applicants' total traffic; no finding as to how much of the traffic for each or all of these commodities

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[34] This finding was based solely on evidence of a minor decrease in the applicants' revenue and revenue per ton on phosphate-rock movements, while tonnage increased. 320 I.C.C. at 153. As the District Court pointed out:

> "This, of course, may only indicate that railroads have priced themselves at a level where cross-elasticity of demand with other modes of carriage will take place." FEC App. p. 20a n. 28.

is generated in central and western Florida; no finding as to the nature and effectiveness of the existing competition between the applicants for carriage of each or all of the commodities; and no coherent finding as to the extent to which the transport of any or all of the commodities is susceptible to intermodal competition.

The Commission did not even attempt to estimate the scope of the rail monopoly that would be created by this merger, or to appraise the effects of that monopoly.

3. The Acknowledged Inadequacy of the Record.

The District Court here has found, unequivocally and repeatedly, that the record compiled before the Commission afforded an inadequate basis on which to assess the anticompetitive consequences of the merger. For example, the court declared:

> "The record in the present case gives us no data on which to predict what action will be taken by a railroad possessing a monopoly in the bulk-haul products market of central Florida." FEC App. pp. 19a-20a.
>
> "Before we could assess the meaning of any such monopoly, we would have to know much more about the competition experienced by phosphate rock and its end-products." *Id.* p. 20a.
>
> "The record does not show what portions of the merging companies' revenues or profits are generated by the carriage of long-haul bulk products originating in Central and Western Florida. Nor does the record show that effective competition for this type of carriage presently exists in Florida." *Id.* p. 23a n. 30.

Instead of remanding the case to the Commission with directions to make the record complete, the court

was content to place the blame for the incompleteness on the plaintiffs, and particularly the Department of Justice. FEC App. pp. 38a-39a, 36a, 41a n. 36.[35]

The acknowledged inadequacy of the record may not be thus dismissed. It may well be suggested that the applicants, rather than the opponents of the merger, must bear the burden of providing sufficient evidence to enable a meaningful assessment of its anti-competitive effects. Apart from that, however, it is the Commission itself, as the statutory representative of the public interest, which bears the ultimate responsibility for compiling a record adequate and complete with respect to all issues affecting the public-interest determination. When such a record has not been compiled—as the District Court found to be true here—it is the duty of a reviewing court to remand the case to the Commission for that purpose.

The precise point has recently been decided by the Court of Appeals for the Second Circuit. *Scenic Hudson Preservation Conference* v. *FPC*, 354 F. 2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). The court there held that an administrative agency charged with effectuating the public interest may not "act as an umpire blandly calling balls and strikes for adversaries appearing before it" (354 F.2d at 620):

> If the Commission is properly to discharge its duty in this regard, the record on which it bases its determination must be complete. The petitioners and the public at large have a right to demand

[35] The court even took the position that arguments of law, however "able" or "cogent," need not be considered by it where they allegedly had not been made before the Commission. FEC App. pp. 36a, 38a.

> this completeness. It is our view, and we find, that the Commission has failed to compile a record which is sufficient to support its decision." *Id.* at 612.
>
> "The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts." *Id.* at 620.

The court accordingly set aside the FPC's order and remanded the case to it, instructing it to "re-examine all questions on which we have found the record insufficient and all related matters." *Id.* at 624. [36]

Similarily, this Court should remand this case to the Commission with instructions (in addition to correcting the Commission's other errors) to complete the record with respect to the anticompetitive effects of the merger.

4. The Erroneous Denial of the Track-Transfer Condition.

To preserve competition and avoid monopoly in the important rail-freight-generating area of central and western Florida, Southern urged before the Commission that any approval of the merger be conditioned on the transfer to Southern or another suitable railroad, on reasonable terms, of one of the merged company's lines of track running from Jacksonville and the north through Orlando to Tampa and points further south. The Commission's rejection of the proposed condition

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[36] See also *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883, 892 (S.D.N.Y. 1951), *aff'd by an equally divided Court*, 342 U.S. 950 (1952); *Michigan Consolidated Gas Co.* v. *FPC*, 283 F.2d 204, 226, *cert. denied*, 364 U.S. 913 (1960); Landis, The Administrative Process 39 (1938); Friendly, The Federal Administrative Agencies 144 (1962).

was based on erroneous standards, inadequate findings, and a general disregard of the statutory public interest in the preservation of competition.

The Commission's central error was its application of a standard based on the private interests of the railroads involved and disregarding the public interest in preserving competition. The Commission's main theme was that the proposed condition would involve an "invasion of territory"—territory which the Commission evidently viewed as the private domain of Seaboard and Coast Line whether independent or merged. The Commission stated:

> "Southern has never served the area between Jacksonville and Tampa, and thus the service sought to be rendered by Southern over the lines requested would constitute an invasion of territory now adequately served by the applicants. Moreover, the operations by Southern over the lines requested would deprive the merged company of substantial revenues. Under certain circumstances, we would be warranted in authorizing such an invasion, but where, as here, Southern's loss of traffic and revenue from the merger will be insignificant, the record provides no factual support for granting Southern's request." 320 I.C.C. at 187; see also 320 I.C.C. at 209.

The Commission thus applied a controlling standard of law whereby a track transfer must be disapproved, whatever its effect in preserving competition, if it would result in the "invasion" by one carrier of another carrier's historic "territory"—except perhaps where the condition is required to restore a carrier's "loss of traffic and revenues."

The standard is erroneous. It is self-evidently based on the *private* interest of individual railroads. It ignores the *public* interest in preserving competition.[37] The latter fact is especially clear from the Commission's reliance on the proposition that the territory in question is "now adequately served by the applicants" (320 I.C.C. at 187, 209, quoted at p. 41 *supra*)—as if the adequacy of competitive service "now" offered assurance against the inadequacy of monopolistic service later.

The Commission did, at one point, take its eye off the private interests of the individual railroads and refer to the public. It stated: "In the absence of a public need for additional service, Southern's request must necessarily be denied." 320 I.C.C. at 209. But this reliance on the alleged absence of a public need for "additional" service (evidenced, it seems, by nothing more than the adequacy of existing, competitive service) no less surely ignores the statutory public need for *competitive* service. *Northeast Airlines, Inc.* v. *CAB*, 331 F.2d 579, 588 (1st Cir. 1964).

The "public need" standard was an improper one for the Commission to apply in the first place. Its mandate under Section 5(2) is to impose upon a proposed merger such conditions as it finds to be "just and reasonable." 49 U.S.C. 5(2)(b). The error of judging proposed conditions by a "public need" rather than a

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[37] In its first opinion in this case, the District Court, setting aside the Commission's order, disapproved the Commission's consideration of conditions to be attached to its approval of the merger on the basis, among others, that "The Commission's primary concern is the 'public interest,' not 'private interest'." 242 F. Supp. 14, 22; FEC App. pp. 54a, 64a-65a. Although the District Court this time ignored the issue, the Commission's error is still there.

"just and reasonable" standard has been pointed out by the Commission itself in the *Great Northern* case (p. 24 n. 16 *supra*):

> "The standard of section 15(3) of the Act—'a real, specified and substantial need'—is not applicable in determining whether routes should be opened as a condition to approval of a merger. The Supreme Court so held in *Atlantic Coast Line R. Co. v. United States, supra* [284 U.S. 288, 295 (1932)]. In a section 5 proceeding, the standard is whether suggested conditions are 'just and reasonable.' In such a proceeding, the protection of a carrier's long-haul may be far less important than the need to minimize traffic diversion and to insure vigorous competition with a merged company . . ." Mimeograph opinion, p. 57.

In rejecting the proposed condition in this case, the Commission did not consider whether it was "just and reasonable." Neither did it consider "the need . . . to insure vigorous competition with a merged company."

5. The Erroneous Denial of the Divestiture Condition.

Another proposed condition that the Commission refused to attach to its approval of the merger concerned divestiture by the merged carrier of its controlling interest in the Louisville & Nashville Railroad. Control of the L&N is now possessed by Coast Line through ownership of more than 33 per cent of the company's stock, and would be transferred to the merged company by virtue of the merger as approved by the Commission. The merged company and the L&N would have the potential for interchanging a very substantial amount of traffic—more traffic than that which in 1957 produced more than $17 million earned by Seaboard on interchanging 115,000 cars with the L&N,

almost $15 million earned by Coast Line on interchanging 91,000 cars with the L&N, and presumably comparable revenues (not disclosed by the record) earned by the L&N on these interchanges and destined, after the merger, to be returned to the merged company as dividends.

The record leaves no doubt that such favoritism in interchange business would take place between the merged company and the L&N, just as it has between Coast Line and the L&N.[38] To the extent that it did take place, a very substantial volume of interchange business would tend to be foreclosed from competition.

The Commission was willing to assume (as the record required) that the merged company and the L&N would favor each other in the interchange of such traffic:

> "Even if it is conceded that a degree of favoritism in the allocation of interchange traffic may exist between the merged company and the Louisville & Nashville . . . ." (320 I.C.C. at 188);
>
> ". . . even assuming a disposition on the part of the merged company to favor the Louisville & Nashville" (320 I.C.C. at 189).

But even if such "a degree of favoritism" did exist, the Commission held,

> ". . . we are convinced that the conditions prescribed herein will prove adequate to protect competing railroads against significant traffic diversion. . . . Because of these and other factors, we

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[38] The top executives of the merging companies stated quite candidly that the merged company would favor the L & N to the extent it could do so consistently with good business judgment—that the L & N would be favored if it was on a competitive par with competing railroads. Tr. 474, 550-551, 1286-1287; Statement A, p. 31; Statement M, p. 13.

> conclude that it is *not necessary in the public interest* to require Coast Line or the merged company to divest itself of stock in the Louisville & Nashville . . . ." 320 I.C.C. at 188-90 (emphasis added).

There are at least three reasons why the Commission's conclusion cannot stand. The first is its application of an erroneous standard requiring that the proposed condition be "necessary in the public interest." As pointed out at pp. 42-43 *supra*, the proper standard, embodied in the language of Section 5(2) and recognized by the Commission in the *Great Northern* case, requires the Commission to impose such conditions "as it shall find to be just and reasonable."

The second reason is the patent inadequacy of the Commission's findings with respect to the potential favoritism. There is nothing in the report to indicate what "degree of favoritism" the Commission was conceding when it concluded that the conditions it prescribed would nevertheless be adequate to forestall "significant traffic diversion." There is no way of knowing whether, if the Commission had found the quantity and quality of favoritism compelled by this record, it would still have thought its conditions to be adequate and the proposed divestiture to be "not necessary in the public interest."

The final reason is the Commission's failure to take account of, or even mention, the antitrust implications of the relationship between the merged company and the L&N as affecting the traffic available for interchange between them. These implications are indicated by, among many other authorities, *United States* v. *DuPont & Co.*, 353 U.S. 586, 607 (1957), where this Court stated:

> "The statutory policy of fostering free competition is obviously furthered when no supplier has

> an advantage over his competitors from an acquisition of his customer's stock likely to have the effects condemned by the statute."

See also *International Salt Co.* v. *United States*, 332 U.S. 392, 397 (1947). Since the Commission altogether failed to consider this policy in the context of its "findings" on favoritism, its decision to reject the proposed condition was not based on an application of the proper standards required by the policies of the antitrust laws."[29]

6. The Public Benefits of the Merger Weighed Against the Public Harms.

The "ultimate question" in this case, as stated in the *per curiam* opinion of this Court, is "whether the merger would be consistent with the public interest despite the foreseeable injury to competition." 382 U.S. at 165; FEC App. p. 52a. On the present record the Commission could not properly answer this question in the affirmative. Incomplete as the record is, it demonstrates a foreseeable injury to competition which so clearly outweighs the public benefits expected to result from the merger that, in any proper "accommodation of § 5(2) and the antitrust legislation," and any proper consideration of the value of competition as an element of the public interest under § 5(2), the Commission could not decide on this record to approve this merger.

The savings expected to result "from the elimination of duplicate facilities and functions" were characterized by the Commission as "foremost among the bene-

[29] It should be noted that the District Court has not dealt with this question in either of its opinions. So far as one can tell, there has been no court review of the issue.

fits" to be realized from the merger. 320 I.C.C. at 206-07. These savings were estimated to "approximate at least $20 million a year before taxes." 320 I.C.C. at 207. The Commission failed, however, to consider how much of these savings could be realized by consolidation of facilities without merger—such as the $2,545,991 that Seaboard and Coast Line were expected to save annually by use of the joint classification yards which they proposed to construct at Jacksonville jointly but without merging.[40] In contrast to its complete disregard here of the savings realizable without merger, the Commission in *Great Northern* (p. 24 n. 16 *supra*) considered the subject in detail and determined that "not less than one-third, or approximately $5,282,267, of the estimated savings totalling $15,846,802 could be realized without merger." Mimeograph opinion, p. 62.

In general, the Commission cannot conceivably determine "whether the merger would be consistent with the public interest despite the foreseeable injury to competition" (382 U.S. at 165; FEC App. p. 52a) without first determining and making findings on the foreseeable injury to competition. The injury to competition can be foreseen and evaluated only by complying with the obligation, imposed by *McLean*, to "estimate the scope and appraise the effects of the curtailment of competition" resulting from the merger. The Commission's failure in this case to carry out this responsibility, particularly with regard to central and western Florida and the transportation of heavy bulk-

[40] See Examiner's Report, p. 25, printed in Jurisdictional Statement of Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, *et al.*, No. 425, October Term, 1965, App. E, App. vol. II, p. 39.

loading commodities, makes impossible any meaningful determination of the public interest. It fatally infects the Commission's orders.

CONCLUSION

For the reasons set forth above, we respectfully submit that probable jurisdiction should be noted.

W. GRAHAM CLAYTOR, JR.
Box 1808
Washington, D. C. 20005

JOHN K. MALLORY, JR.
STEPHEN R. BARNETT
1250 Connecticut Ave., N. W.
Washington, D. C. 20036

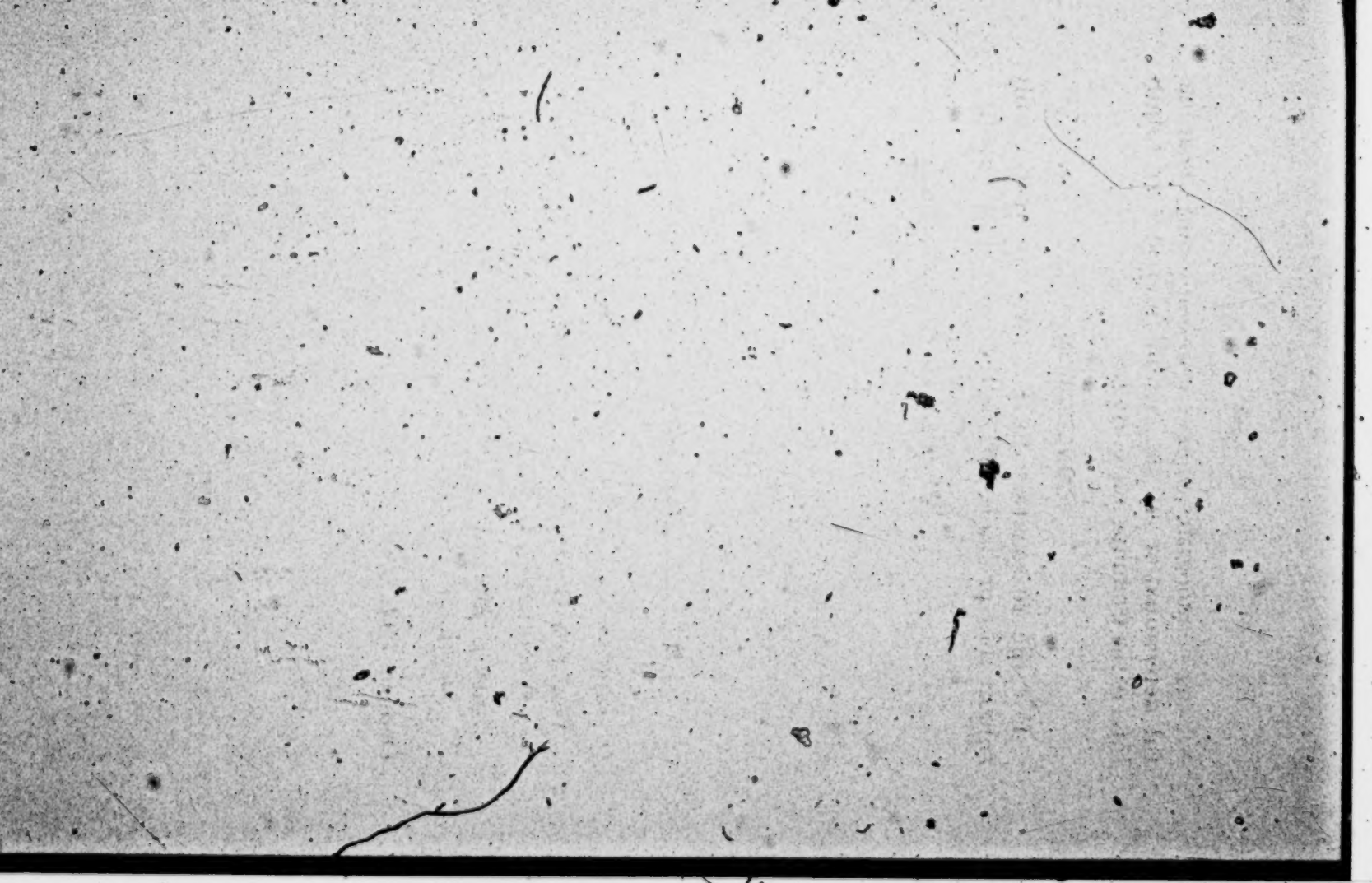
Attorneys for Appellants
Southern Railway Co. et al.

Of Counsel:

WILLIAM D. MCLEAN
Washington, D. C.

JOHN B. MILLER
Savannah, Georgia

October 1966



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Supreme Court of the United States

OCTOBER TERM, 1966

FLORIDA EAST COAST RAILWAY COMPANY,
APPELLANT
v. No. 638
UNITED STATES OF AMERICA, ET AL

CITY OF TAMPA, FLORIDA, APPELLANT
v. No. 639
UNITED STATES AND INTERSTATE COMMERCE
COMMISSION, ET AL

SOUTHERN RAILWAY SYSTEM, APPELLANT
v. No. 641
UNITED STATES OF AMERICA

ON APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF AMICUS CURIAE OF THE TAMPA PORT AUTHORITY

JAMES M. WEAVER
Attorney and Authorized Law Officer for
Tampa Port Authority
Foot of Grant Street
P. O. Box 981
Tampa, Florida

November 23, 1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

FLORIDA EAST COAST RAILWAY COMPANY,
APPELLANT
v. No. 638
UNITED STATES OF AMERICA, ET AL

CITY OF TAMPA, FLORIDA, APPELLANT
v. No. 639
UNITED STATES AND INTERSTATE COMMERCE
COMMISSION, ET AL

SOUTHERN RAILWAY SYSTEM, APPELLANT
v. No. 641
UNITED STATES OF AMERICA

ON APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF AMICUS CURIAE OF THE TAMPA PORT AUTHORITY

Statement

Tampa Port Authority is a political subdivision of the State of Florida, created by Chapter 23338, laws of Florida, special acts of 1945, as from time to time amended.[1]

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[1] Citations to the original act and amendments prior to 1963 are found in Chapter 63-1400, laws of Florida, special acts of 1963, which changed the name to Tampa Port Authority. It is printed as Appendix A hereto.

This brief *amicus curiae* is presented for the Tampa Port Authority, sponsored by James M. Weaver, Esq., its authorized law officer and a member of the bar of this Court, and is submitted pursuant to Rule 42(4) of the Rules of this Court, and Tampa Port Authority respectfully prays that the Court receive and consider this its brief *amicus curiae*.[2]

The Interest of the Amicus Curiae

Tampa Port Authority aligns itself with the appellants in opposition to the merger of the Seaboard and the Coast Line as now authorized and approved by the Commission. Tampa Port Authority is charged by Section 7 of the statute of its creation, among other things, with "* * * the specific responsibility of planning, and carrying out plans, for the long range development of the facilities of and traffic through the Port in the Port District."[3]

The most important traffic through the port of Tampa with which lies the concern and interest of Tampa Port Authority as *amicus curiae* is the outbound movement of phosphate rock. The movement of phosphate rock is, likewise, of vital importance to the applicant Railroads.

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[2] Short form names for the applicants and the Interstate Commerce Commission are used throughout, and the Seaboard and the Coast Line are referred to together as the "Railroads." Page numbers in parentheses, unless otherwise indicated, refer to the report of the Commission in 320 I.C.C. p. 122-214, and the dissent by Commissioners Webb and Tucker, 320 I.C.C. p. 214-246, and the appendices, p. 247-269.

[3] Section 7 also provided that the Port Authority should endeavor to attain that objective through encouraging and facilitating the investment of private capital. The requirements in that connection were slightly modified by Chapter 63-1399, laws of Florida, special acts of 1963, which is printed as Appendix B hereto.

The Commission made no specific findings as to what portion of the applicant's revenues or profits are generated by the carriage of long-haul bulk products, particularly phosphate rock originating in central and western Florida. The Commission, however, has very full and comprehensive judicial knowledge of those facts as the all-rail movement of phosphate rock from the central and western areas of Florida to interior points has been before the Commission in many proceedings.[4]

In *Routing, Cancellation, Phosphate Rock, Seaboard A.L.R. Co.*, 299 I.C.C. 147, at pages 148-149, the Commission said:

> "Phosphate rock originates in Florida principally in an area known as the pebble-rock district, approximately 41 miles east of Tampa, Fla., and about 200 miles south of Jacksonville. There are 16 points in Florida at which this traffic originates, 9 of which are served by the Seaboard and the Coast Line, 4 are local points on the Seaboard, and 3 are situated locally on the Coast Line. Thus the Seaboard and the Coast Line are in direct competition for this traffic at origin, which, from a revenue standpoint, is by far one of the most important of the commodities transported by these carriers."

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[4] *Atlantic Coast Line R. Co.* v. *Seaboard Air Line R. Co.*, 286 I.C.C. 669 (Sept. 2, 1952).

Atlantic Coast Line R. Co. v. Seaboard Airline R. Co., 291 I.C.C. 329 (Jan. 11, 1954) (Sustained in *Seaboard Air Line Railroad Co.* v. *United States*, 131 F. Supp. 129 (D.C.VA. 1954), affirmed 349 U.S. 902, rehearing denied 349 U.S. 941).

Routing, Cancellation, Phosphate Rock, Seaboard A.L.R. Co. 299 I.C.C. 147 (Sept. 26, 1956).

Seaboard A.L.R. Co. Routing Cancellation, Phosphate Rock. 300 I.C.C. 747 (May 29, 1957) reversing 299 I.C.C. 147.

Phosphate Rock, Florida to Arkansas, Illinois and South, 299 I.C.C. 593 (Dec. 19, 1956).

Seaboard Air Line R. Co. Routing Cancellation, 301 I.C.C. 129 (June 26, 1957).

Omission of Routing on Phosphate Rock, 302 I.C.C. 275 (Nov. 12, 1957).

and in *Seaboard Air Line R. Co., Routing Cancellation*, 301 I.C.C. 129, at page 131, the Commission said, of the Seaboard:

> "The importance of the phosphate-rock traffic to the Seaboard is indicated by a showing that in the years, 1951, 1952, 1953, 1954, and 1955 this traffic represented, respectively, 21.06, 22, 22.66, 23.95, and 19.68 percent of all carload freight tonnage moved by it in those years, and yielded 12.70, 12.32, 12.83, 13.72, and 11.26 percent of its total carload freight revenue. No other single commodity transported by the Seaboard is as important to it either from a revenue or tonnage standpoint."

There would seem to be little doubt that there is likewise, as to the Coast Line, no other single commodity as important to it either from a revenue or tonnage standpoint.

Additionally, apart from the records in the proceedings cited in footnote 4 above, the Freight Commodity Statistics put out by the Commission's own Bureau of Transport Economics and Statistics gives by years up to and including the year ended December 31, 1963, the total carload freight revenue and the revenue from phosphate rock (item 343) for the Seaboard and the Coast Line. For the year ended December 31, 1962, for example, being the last full year preceding the approving order of December 2, 1963, the total carload freight revenues of the Seaboard and the Coast Line were, respectively, $137,954,032 and $144,993,826 and their respective revenues from phosphate rock were $13,695,608 and $13,650,495. We are indeed in an ad-

ministrative wasteland if the gatherer of the facts is precluded from their knowledge and if they are to be withheld from consideration by the Courts in reviewing administrative action.

In view of the importance of the movement of phosphate rock to these carriers, and the vital importance of considering the effect of the removal of all competition in respect of that traffic, it is difficult to pass off as ineptness of the Department of Justice the failure of this record to show those vital facts. Rather it stands as a reproach to the Commission, but, as pointed out hereinafter under the Argument, there is ample evidence to show that the findings of the Commission respecting the competition remaining in the movement of phosphate rock are not supported by the evidence and should not survive judicial review.

Tampa Port Authority Is Not Guilty of Laches

At December 2, 1963, the date of the Commission's approving order herein, all of the facilities at the port of Tampa for the transfer of phosphate rock from rail cars to vessels were owned and operated by the Railroads and had been so owned and operated by the Railroads for many years, and at that time the Tampa Port Authority relied upon (a) the Commission's analysis of the continuance of adequate competition and (b) the protective conditions attached by the Commission to its approval order and found in Appendix XI (320 I.C.C. at p. 267-269).

Developments since December 2, 1963, including a decision by the Commission as recently as three weeks ago (November 8, 1966) have compelled the Tampa

Port Authority to the conclusion (a) that the merger of the Seaboard and the Coast Line as now authorized and approved by the Commission will work irreparable harm to the port of Tampa which the Commission's protective conditions will neither prevent nor ameliorate and (b) that the Commission's analysis in respect of the continued existence of competition in the movement of phosphate rock is faulty and that in respect of such movement the Commission's findings are not based on substantial evidence, and, in fact, in one very important respect are based upon a plain misstatement of facts of record.[5]

The developments subsequent to December 2, 1963, which have influenced the Tampa Port Authority, may be summarized as;

(1) the efforts of the Railroads by their joint application in Finance Docket No. 23688 filed June 14, 1965 presently being pressed vigorously before the Commission on exceptions to an adverse examiner's report served September 9, 1966, which if successful would take away from the port of Tampa all of the outbound water borne movement of phosphate rock,[6] and

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[5] The following finding appears on page 151:

> "In 1960, the total waterborne traffic at Tampa was particularly heavy, consisting of 6 million tons of inbound traffic and 2.7 million tons of outbound traffic."

This statement fails to include or to give any consideration or effect to the 3.2 million tons of phosphate rock moving outbound from the port of Tampa to foreign ports (p. 321).

[6] In footnote 19, on page 27, of the joint motion of the appellees to affirm there appears to be an inuendo that the City of Tampa is opposing the merger for an ulterior purpose, i.e. to insure the continued movement of phosphate rock through the port of Tampa. If that is an improper ground for opposing the merger, the Tampa Port Authority is guilty of the same impropriety. It considers that the movement of that traffic through the port of Tampa is vital to the continued existence of Tampa as a major port and that the port of Tampa is itself jeopardized by this merger which will destroy the last vestige of rail competition in the movement of this important commodity.

(2) the recommended denial by a hearing examiner of the proposal of the Tampa Phosphate Railroad Company in Finance Docket No. 23718 to provide a competitive and efficient form of transportation for phosphate rock to the port only, without participation in the all-rail movement to the interior so that, among other things, it would have control of its cars which would be returned from the port to the mines and dryers in "fast shuttle service" [7], and

(3) the denial by order served September 26, 1966, printed as Appendix C hereto, of the petition of Port Sutton, Inc. for leave to intervene in the merger proceeding before the Commission (Finance Docket No. 21215) notwithstanding the apparent authority of condition 13 of Appendix XL (320 I.C.C. p. 268) that any person having an interest in the subject matter at any future time may make application to the Commission for the modification of the protective conditions (Port Sutton, Inc. being a private interest owning all of the capital stock of the Tampa Phosphate Railroad Company) and

(4) the insistence by the Railroads upon the continued use of only an in-vessel rate for the movement of phosphate rock to the railroad owned and operated phosphate loading facilities at the port of Tampa, and the refusal of the Commission, in Docket No. 34619 and Docket No. 34619 (Sub. No. 1), by order served November 8, 1966, printed as Appendix D hereto, to require the Railroads to state separately the line haul rate and the port charges, so as to permit either Port Sutton, Inc. other private interests, or the Tampa Port Authority, to know the charges that would have to be met in constructing and operating phosphate loading facilities to keep the outbound water movement of phosphate rock moving through the port of Tampa.

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[7] Cf. *Illinois Central Railroad Company* v. *Norfolk and Western Railway Company*, 35 Law Week 4008 at p. 4011, decided by this Court November 14, 1966, in which that term is used.

ARGUMENT

This record does show that the total movement of phosphate rock for the year 1957-1958 was 12 million tons[a] and that half of that amount, or 6.1 million tons, moved all rail to interior points in the United States and Canada, and the other half, or 5.9 million tons, moved to the port of Tampa for movement beyond by water, and that of the 5.9 million tons moving to the port of Tampa for movement beyond by water, 2.7 million tons moved to other domestic ports and 3.2 million tons went to foreign ports (320 I. C. C. at p. 231). That differentiation is necessary for the proper analysis and appraisement of the Commission's findings respecting the effects of the merger, and, in particular, the Commission's reliance upon the continued existence of effective intramodal, or rail, competition.

The Commission found that the situation at Tampa and in the central and western portions of Florida was unique in that those areas were served by no other railroads except the Seaboard and the Coast Line (p. 164).

The Commission further found, or admitted, that (p. 166), "There is no question that there will be a significant reduction in rail competition in Florida". But then, in language of softness and delicacy, it suggests that rail competition will be preserved in respect of the all rail movement to the interior by the opening of the Jacksonville gateway to the Southern[b] and states its purpose and intent to open the Jacksonville gateway to

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[a] (320 I. C. C. at p. 151): " * * * of which 12 million tons, almost exclusively phosphate rock, essentially a commodity normally handled by rail were forwarded from Mulberry, Florida."

[b] (320 I. C. C. at p. 166): "However, the overall reduction in rail competition in the Southeastern States viewed as a whole will be relatively moderate when considered in the light of the alternative rail service that will be provided by competitors of the merged company at practically all of the major industrial centers throughout the affected area."

the Southern (p. 182); " * * * even though the effect of this condition may be to require the merged company to shorthaul itself with respect to certain of its originated traffic."

The suggestion that the opening of the Jacksonville gateway to the Southern will preserve intramodal competition in the all-rail movement of phosphate rock from Florida is little short of farcial. (Motion of appellees, to affirm, pages 28-30). The life blood of the phosphate shippers is the supply of cars, and the Southern can supply no cars to the phosphate shippers in central and western Florida. The retalitory power of the merged road in the matter of car supply will be instantaneous and lethal, and it is simply contrary to human experience seriously to believe that any amount of solicitation on the part of the Southern will induce the phosphate shippers to short-haul the merged road by specifying routing via the Southern beyond Jacksonville.

As to intermodal competition for this movement of 6.1 million tons moving all-rail to interior points, it is perfectly apparent that it cannot be provided by trucks, and the suggestion of the Commission that the movement of the 2.7 million tons moving to the port of Tampa and thence by water to domestic points is competetive with the all-rail movement [10] would appear to be simply contrary to the fact.

The Railroads do not now and presumably the merged road will not publish joint rates and through routes via Tampa with the water cariers. The movement of that 2.7 million tons to domestic destinations is something that exists now and is not something that will replace the future disappearance of any rail competition in the movement of phosphate rock from central and

[10] (320 I.C.C. at p. 152): "That this water movement is to a large extent competitive with rail is reflected by the fact that nearly all of such traffic originated and terminated at points served by American and Canadian railroads."

western Florida to interior points all-rail. It is and will remain simply to destinations which the Railroads deem it non-compensatory to serve and with respect to which they are quite content to receive their in-vessel revenue on the haul to the port of Tampa.

With respect to the 3.2 million tons moving to the port of Tampa for export to foreign ports, the suggestion that there can be substitute rail competition in the haul to the port obviously cannot be made. As to that 3.2 million tons the only possible competition would be from the trucks and there is no meaningful discussion or finding in the Commission's report as to the extent or volume of the truck movement of phosphate rock to the port of Tampa for movement beyond by water.

Tampa Port Authority confesses its complete inability to understand the statement in the Commission's report that (p. 153), "The competition faced by the railroads from other modes of transport in the Tampa area is most apparent with respect to the movement of phosphate rock." To the Tampa Port Authority it is not only not apparent but such intermodal competition as may exist is wholly insufficient and inadequate to compensate for the intramodal competition that will have been destroyed beyond recall, unless, of course, either the Commission grants the application of the Tampa Phosphate Railroad in Finance Docket No. 23718, or permits Port Sutton, Inc., to intervene in Finance Docket No. 21215 and imposes the additional protective condition permitting the construction and operation of the Tampa Phosphate Railroad Company. Due to the inaccesability of the latter's proposed trackage and the "captive" nature of much of the phosphate rock, the adverse effect on the merged road would be much less than that of the protective conditions permitting the Southern access to the St. Regis plant at Quinlan, Florida (320 I. C. C. at p. 268).

Conclusion

The Tampa Port Authority respectfully submits that with respect to the movement of phosphate rock as a whole, both all-rail to interior points in the United States and Canada, and also to the port of Tampa for movement beyond by water to domestic and foreign ports, the findings of the Commission that (p. 167): (1) the reduction of rail competition will not be substantial; (2) ample competitive rail service will remain; and (3) such reduction in competition as will result will have no appreciably injurious effect upon shippers and communities, are not supported by substantial evidence on the record viewed as a whole.

Tampa Port Authority further respectfully submits (a) that the Motion to Affirm made by the Appellees should be denied, (b) That this Court should note probable jurisdiction, and (c) after hearing and consideration should reverse the order of the Court below with directions to enjoin permanently the Commission's approving order of December 2, 1963.

Respectfully submitted,

JAMES M. WEAVER
Attorney and Authorized Law Officer for
Tampa Port Authority,
Foot of Grant Street
P. O. Box 981
Tampa, Florida

November 23, 1966

APPENDIX A

CHAPTER 63-1400

SENATE BILL NO. 1077

AN ACT to change the name of the Hillsborough county port authority, the governing body of the Hillsborough county port district, to Tampa port authority and to provide for the amendment of chapter 23338, laws of Florida, special acts of 1945, as amended: chapter 24577 and chapter 24578, laws of Florida, special acts of 1947; chapter 25879, laws of Florida, special acts of 1949; chapter 27600, laws of Florida, special acts of 1951; chapter 30820, laws of Florida, special acts of 1955; chapter 57-1380, laws of Florida, special acts of 1957; and chapter 59-1358, laws of Florida, special acts of 1959 in order to accomplish this name change.

Be It Enacted by the Legislature of the State of Florida:

Section 1. That the name of the governing body of the Hillsborough county port district shall be "Tampa port authority" and that wherever the term "Hillsborough county port authority", "port authority" or "authority" shall be used in chapter 23338, laws of Florida, special acts of 1945, as amended: chapter 24577 and chapter 24578, laws of Florida, special acts of 1947; chapter 25879, laws of Florida, special acts of 1949; chapter 27600, laws of Florida, special acts of 1951; chapter 30820, laws of Florida, special acts of 1955; chapter 57-1380, laws of Florida, special acts of 1957; and chapter 59-1358, laws of Florida, special acts of 1959 and all other laws enacted by the legislature of the state of Florida, it shall mean the Tampa port authority which henceforward shall be the name of the governing body of the Hillsborough county port district.

Section 2. This act shall take effect immediately upon becoming a law.

Became a law without the Governor's approval.

Filed in Office Secretary of State June 3, 1963.

APPENDIX B

CHAPTER 63-1399

SENATE BILL NO. 1076

AN ACT to amend chapter 23338, Laws of Florida, special acts of 1945, as amended, by amending the introductory paragraph of Section 7 of such chapter in order to provide for no more than sixty (60) days notice of a public hearing when the Hillsborough County port authority is considering acquiring the ownership, control or operation of any project with the purpose of such notice being to permit private capital to consider the erection, installation and operation of such a project.

Be It Enacted by the Legislature of the State of Florida:

Section 1. That notwithstanding the provisions of the introductory paragraph of section 7 of chapter 23338, laws of Florida, special acts of 1945, as amended, the Hillsborough county port authority shall, before it acquires the ownership, control or operation of any project give sixty (60) days notice of a public hearing thereon as to any project the value of which at the time of such notice is reasonably estimated to exceed one hundred thousand dollars ($100,000.00) by advertising in a newspaper of general circulation published in the port district, at least once each week for four (4) weeks prior to such hearing, said first publication to be at least sixty (60) days before said hearing, which notice shall state among other things that, unless definite arrangements are made by private capital to erect, install and operate such a project, the port authority will consider doing so. It is the purpose of this notice procedure to give private capital the opportunity to engage in the business of the project described in said notice should such private capital be willing so to do.

Section 2. This act shall take effect immediately upon becoming a law.

Became a law without the Governor's approval.

Filed in Office Secretary of State June 3, 1963.

APPENDIX C

SERVICE DATE
September 26, 1966

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D.C., on the 8th day of September, 1966.

Finance Docket No. 21215

SEABOARD AIR LINE R. CO.—MERGER—
ATLANTIC COAST LINE

Upon consideration of the record in the above-entitled proceeding; the petition for leave to intervene, reopening, reconsideration, and further hearing, dated February 25, 1966, filed by Port Sutton, Inc.; the Addenda accompanying said petition; the reply to the petition by Seaboard Air Line Railroad and Atlantic Coast Line Railroad Company, filed March 10, 1966; and

It appearing, That, notwithstanding full opportunity being accorded interested parties to intervene in and become parties to the above-numbered proceeding and to present evidence in respect of the issues involved therein, petitioner neither sought nor made intervention therein and did not participate in the proceeding during the time it was pending before the Commission;

It further appearing, That, now, more than 5 years after the instant proceeding was instituted and more than 2 years after issuance by the Commission of its decision therein (*Seaboard Air Line R. Co.-Merger-Atlantic Coast Line,* 320 I.C.C. 122), petitioner seeks leave of the Commission to intervene and to become a party to the proceeding, and requests reopening of the proceeding, reconsideration, and limited further hearing;

It further appearing, That the aforementioned decision of the Commission is now before the Courts on appeal;

It further appearing, That, concurrently with the filing of the instant petition with the Commission, petitioner also filed with the United States District Court, Middle District of Florida, Jacksonville Division, before whom said appeal was pending, a petition for leave to intervene in the instant proceeding and a suggestion that, if the court deemed action by it necessary to the resumption of jurisdiction over the proceeding by this Commission, it enter an appropriate order permitting a remand of the proceedings for the limited purpose specified in that petition;

It further appearing, That, by order entered by said Court on March 9, 1966, said petition was denied but without prejudice to petitioner taking such action, if any, before this Commission, as may be in keeping with its rules;

It further appearing, That, by way of justification for the delayed filing of its petition herein, petitioner refers to the filing, on June 14, 1965, by the applicants herein of their joint application in Finance Docket No. 23688 for authority to construct and operate a line of railroad extending from a point in the phosphate territory of Polk County, Florida, to a new port terminal facility at Piney Point in Manatee County, Florida, and asserts that such filing has the effect of so substantially changing the issues in the instant proceeding to the extent they relate to rail service in the Port Tampa, Florida, area, as to warrant the granting of the intervention and other relief here requested;

It further appearing, That there is only a remote relationship between the proposal in Finance Docket No. 23688 and those involved in the instant proceeding; that no proper basis exists for the presumption that either the granting or the denial of the authority sought in Finance Docket No. 23688 would have any appreciable bearing upon any of the issues involved in the instant proceeding; and that, accordingly, good cause has not been shown for the granting, at this late date, of the intervention here requested;

It further appearing, That no fact or circumstance has been presented or suggested by petitioner warranting the reopening of the instant proceeding, upon the Commission's own motion, for the purpose of modifying the conditions imposed in the Commission decision in the instant proceeding; and

It further appearing, That no proper basis has been established for the granting of any of the relief requested by petitioner herein:

It is ordered, That the petition be, and it is hereby, denied.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX D

SERVICE DATE

November 8, 1966

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 24th day of October, A. D. 1966.

No. 34619[1]

GREATER TAMPA CHAMBER OF COMMERCE
v.
ATLANTIC COAST LINE RAILROAD COMPANY
ET AL.

Upon consideration of the record in the above-entitled proceedings; the petition filed on July 18, 1966 by the complainants for reconsideration of the report and order of the Commission, Rates and Practices Review Board, decided on June 8, 1966; and reply thereto filed on August 22, 1966 by defendants:

It is ordered, That the petition be, and it is hereby, denied for the reason that it does not present sufficient grounds to warrant granting the action sought.

By the Commission.

H. NEIL GARSON
Secretary

(SEAL)

[1] Embraces also No. 34619 (Sub-No. 1), Tampa Port Authority v. Same.

In the Supreme Court of the United States

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UNITED STATES AND INTERSTATE COMMERCE COMMISSION, ET AL.

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SOUTHERN RAILWAY SYSTEM, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MEMORANDUM FOR THE UNITED STATES

STATEMENT

On July 22, 1960, Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Com-

237-563—66

pany—two of the three major railroads in the southeastern United States[1]—applied to the Interstate Commerce Commission, pursuant to Section 5(2)(b) of the Interstate Commerce Act, 49 U.S.C. 5(2)(b), for authorization to merge. After extended proceedings, the Commission, on December 2, 1963, approved the application, finding it to be "consistent with the public interest," the statutory standard. 320 I.C.C. 122.

An action to set aside the Commission's order was brought in a three-judge federal district court in Florida. Controversy focused on the adequacy of the Commission's findings with respect to the alleged adverse competitive effects of the merger, the United States (among other parties) arguing that they were inadequate. The district court, upon its initial review, found it unnecessary to consider the particularized challenges to the Commission's findings on competition; it held that, in any event, the order must be set aside because the Commission had failed "to decide whether or not section 7 of the Clayton Act would be violated by the proposed merger" and to make the market analysis required in a Section 7 case. 242 F. Supp. 14, 20.

The Commission and the merger applicants appealed to this Court, which summarily reversed the judgment of the district court. *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154 (*per curiam*). The Court held that the Commission was not required to make Section 7 findings, although it was obliged

[1] The third is Southern Railway Company.

to "estimate the scope and appraise the effects of the curtailment of competition" resulting from the merger, as the Court had held in *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87, and *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 186. The Court declined to consider the adequacy of the findings the Commission had made on competition. Deeming that a matter for the district court in the first instance, it remanded the case "for a full review of the administrative order and findings pursuant to the standards enunciated by this Court."[2]

On remand, the United States again urged the inadequacy of the Commission's findings. The district court, however, upheld the findings and order.[3] These appeals followed.[4]

DISCUSSION

1. A merger duly approved by the Interstate Commerce Commission cannot be challenged under the antitrust laws. 49 U.S.C. 5(11). But that is not to

[2] The course adopted by the Court had been urged by the United States. We had stated that on remand we would renew our contention that the Commission's findings were inadequate. Memorandum for the United States, Nos. 425 and 555, O.T. 1965, pp. 4–5.

[3] The opinion of the district court is not yet reported. It is printed as Appendix A to the Jurisdictional Statement of Florida East Coast Railway Company.

[4] We do not here respond to the appeal of the Railway Labor Executives' Association (No. 640, this Term), challenging the labor-protective conditions imposed by the Commission, in view of the anticipated settlement of that phase of the case. See the application of appellees Seaboard Air Line *et al.*, filed November 3, 1966, for an extension of time within which to move to affirm in No. 640.

say that the Commission is free to ignore competition—the policy which underlies those laws—in deciding whether a merger should be approved as consistent with the public interest. The Commission's guide in determining where the public interest lies is whether the proposal will promote "adequate, economical, and efficient service" and "sound economic conditions in transportation" (National Transportation Policy, 49 U.S.C. preceding § 1), and competition is an important method whereby efficiency is spurred and sound economic conditions fostered. Therefore, the competitive impact of a merger is a factor that the Commission must consider carefully, and evaluate thoroughly (*McLean, Minneapolis, supra*).

Of course, having done so, the Commission may in the particular case conclude that any adverse competitive effects the merger may have are outweighed by other factors and that, on balance, the merger is in the public interest. We do not quarrel with the balancing process; the statute plainly requires it. But it is no less plain that the Commission cannot perform its balancing function in a rational and sound manner without making a reasonable effort to determine the scope and magnitude of the merger's adverse competitive effects. And while the Commission need not follow the identical analysis, or make the same findings, as would be required in an antitrust case (*Seaboard Air Line R. Co., supra*), it is surely the proper office of judicial review to insist that the Commission's opinion clearly show that it carefully considered the competitive dimension.

2. Tested by this standard, the findings with respect to competition which the Commission made in approving the merger of Atlantic and Seaboard were, we believe, deficient. We note here what we regard as the most serious deficiencies.

First. The Commission seemingly assumed that the only adverse effects of the merger would be felt in western and central Florida, where Atlantic and Seaboard are the only railroads. It failed even to advert to the possibility that the merger might injure competition throughout the Southeast by reducing the number of major roads from three to two. Competition is generally more vigorous and effective where there are many competitors; it is especially likely to be weakened when, in a market already dominated by a small number of firms, one of the majors is eliminated as an independent competitive factor.

We recognize that the Commission was not completely indifferent to the possible competitive impact of the merger throughout the Southeast. Its opinion contains repeated findings that, outside of Florida, rail competition would remain vigorous and effective after the merger (320 I.C.C. at 164, 166, 211), and it specifically found that, by virtue of certain conditions designed to increase Southern Railway's access to the eastern Florida market, the merger would "create more balanced competition among the several rail carriers in the southeastern seaboard area" (*id.* at 184) and produce "an increase rather than decrease in intramodal rail competition" (*id.* at 188). But the Commission's opinion does not consider the possibility

that, while Southern would doubtless continue to compete vigorously against the merged roads, a reduction in the number of major competing railroad systems in the Southeast might nonetheless have a serious adverse impact on rail competition generally in the region. The district court did not mention, let alone condone, this deficiency in the Commission's findings.

Second. The Commission, conceding that the merger would produce a rail monopoly in portions of Florida, discounted the economic impact of the monopoly by reference to the vigor of competition from other modes of transportation—trucks and barges. But it failed to determine the actual extent to which competing modes provide an adequate alternative to Florida shippers who now use rail service. Doubtless the Commission was aware that, for the foreseeable future, certain kinds of shipments would continue to move largely if not exclusively by rail; it stated that competition among railroads was still a value worth preserving (320 I.C.C. at 210). Yet, the Commission's opinion, it seems to us, too readily assumes that the adverse effects of the Florida monopoly would be largely offset by the strength of the competition from other modes (*id.* at 166, 211–212). We believe that a more probing inquiry by the Commission would have revealed that the railroads continue to enjoy substantial monopoly power in the long-haul transportation of many important commodities produced in the affected area, and we point out that this was the view of the district court as well (F.E.C. J.S., App. A, p. 20a). But, however

that may be, surely the Commission was not entitled to *presume* the efficacy of inter-modal competition. It was required to analyze with some particularity the extent to which the affected Florida shippers would, in fact, be shielded from the injurious effects of a rail monopoly by the availability of service by trucks or barges. We find no such analysis in its opinion.

Third. In balancing the adverse competitive effects of the merger in Florida against its overall benefits, the Commission made, we think, insufficient effort to measure the magnitude of those effects. It did not attempt to determine how many shippers would be denied competitive rail service. Nor did it attempt to assess the hardship to them of such denial—a deficiency obviously related to the Commission's apparent assumption that shippers dissatisfied with the service of a rail monopolist have ready recourse to competing non-rail carriers. The Commission considered the number of *localities* that would be deprived of competitive rail service as a result of the merger (320 I.C.C. at 164–165), but not the character of the shipments originating in those localities or the dependence of the shippers in those localities on rail service. It satisfied itself that only one city of more than 200,000 population (Tampa) would be deprived of competitive rail service (*ibid.*), but it ignored the possibility that smaller cities might be equally or more important sources of rail shipments (especially of minerals, forest and farm products, which typically do not originate in large cities); nor did it consider the probable impact of single-rail service on Tampa itself.

3. In summary, judging the Commission by what it said, as we must, we believe that it made insufficient attempt to determine the substantiality of the merger's adverse competitive effects. More considered analysis, we think, was necessary before the Commission could meaningfully weigh those effects against the merger's benefits. We agree, of course, that had the Commission made the proper analysis and found—as we think the record shows—that the adverse competitive effects of the Atlantic-Seaboard merger would indeed be great, it might still have approved the merger. But it would have done so with its eyes open. Instead, the Commission weighed against the benefits of the merger a determination that "such reduction in competition as will result from the merger will have no appreciably injurious effect upon shippers and communities" (320 I.C.C. at 167)—a view, we believe, not adequately supported in the Commission's opinion. One cannot say what the Commission's judgment would have been had it more fully confronted and analyzed the crucial issues of competition in this case.

It may be questioned whether a dispute as to the adequacy of an agency's analysis of one of the public-interest factors that it must consider provides a sufficient basis for invoking plenary review by this Court, especially where, as in this case, the initial reviewing court, in a lengthy and considered opinion, sustained the agency's order. But there are special circumstances here. At issue is a major merger which will remake the railroad map of the entire southeastern United States. And it is but one of a large wave of

railroad mergers, constituting a movement nationwide in scope and likely to have profound and permanent effects upon the transportation industry of this country. All of these mergers must be submitted to the Commission for approval, and, once approved, they are, of course, immune from antitrust challenge. In the circumstances, insistence upon the adequacy of the Commission's analysis of competition is surely not hypertechnical.

There is, in short, a clear need for early delineation of the standard of care to which the Commission shall be held in evaluating the competitive dimension of railroad mergers, and this consideration persuades us that the case—despite its obvious difficulties—is one which would warrant plenary consideration by this Court.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

RICHARD A. POSNER,
Assistant to the Solicitor General.

EDWIN M. ZIMMERMAN,
LIONEL KESTENBAUM,
THOMAS R. ASHER,
Attorneys.

NOVEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Nos. 638, 639 and 641

FLORIDA EAST COAST RAILWAY COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

CITY OF TAMPA, FLORIDA,

Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

SOUTHERN RAILWAY SYSTEM,

Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

REPLY MEMORANDUM TO THE MEMORANDUM FOR THE UNITED STATES

The sole argument which the Department of Justice makes in urging this Court to undertake a plenary review of the exhaustive Report of the Commission in this matter is, admittedly, directed only "to the adequacy of an agency's analysis of one of the public-interest factors that it must consider" in reaching its overall determination as to the consistency of a proposed merger with the public interest.

(U.S. Memo 8)[1] The sole issue which the Department now raises is whether the Commission's Report demonstrates that it made "a reasonable effort to determine the scope and magnitude of the merger's adverse competitive effect" or, putting it another way, whether that Report "clearly show[s] that it [the Commission] carefully considered the competitive dimension." (U.S. Memo 4)

It is somewhat hard to understand this objection because the majority of the Commission's lengthy Report deals—and in considerable detail—with the competitive factor. (See 320 I.C.C., at 127-35; 139; 149-53; 161-84; 186-90; 206-12) One must conclude that the Department of Justice's real attack is upon the particular resolution of the issues at which the Commission arrived after considering the various factors—a matter obviously, as the Department concedes, within the Commission's jurisdiction (U.S. Memo 4, 8)—and not upon the techniques of the Commission's analysis of the competitive factor; an analysis which was undertaken largely in terms specific to the transportation industry. The Department makes no attack on the Commission's findings on any ground that they are not based on substantial evidence.

The Department specifies three respects in which it alleges that the Commission's grasp of the competitive factor was deficient. We will respond to each in turn.

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[1] We will use abbreviations herein similar to those used in our Motion to Affirm. References such as "FEC," etc., with page numbers, are to the pages of the Jurisdictional Statement filed by the indicated appellant. References to "Ex. Rep. fol." are to the indicated folio page (not the printed page) in the Examiner's Report, nine copies of which we have filed with the Clerk. References to "Statement" are to the indicated written statements received in evidence before the Commission; references to "Ex." are to the indicated exhibits received in evidence before the Commission; references to "St." after exhibit references are to statements forming a part of the indicated exhibit. References to "U.S. Memo" are to the "Memorandum for the United States" filed in connection with these appeals.

First. The Department contends that the "Commission seemingly assumed that the only adverse effects of the merger would be felt in western and central Florida, where Atlantic and Seaboard are the only railroads." (U.S. Memo 5) The Department apparently contends that had the Commission realized that there would be a decrease in the number of major rail competitors, from three to two, throughout the Southeastern United States by reason of the merger, and had the Commission thought about this point, it might have viewed the merger in a different light.

The fact that the merger would reduce the major rail systems in the Southeast from three to two was not a private vision of the Antitrust Division, unshared by the Commission. The Commission, of course, fully realized that the merger would eliminate competition between the Seaboard and the Coast Line throughout the Southeastern region. In the section of the Commission's Report entitled "Competitive Effects of the Merger Upon the Public," the very first sentence is: "The proposed merger would result in the elimination of present competition between Seaboard and Coast Line in a 6-State area." (320 I.C.C., at 163) The Commission's Report extensively discusses the competitive impact of the merger throughout the Southeast (320 I.C.C., at 149-52; 163-64; 166-67; 188-90; 207-12), as does the Examiner's Report, which the Commission adopted.[2] (Ex. Rep. fol. 33-36; 47-95; 120-21; 124-29; 131; 137-38; 148-53) The Department's attempt to deny that the Commission considered the fact that the competition between the Seaboard and the Coast Line would be eliminated throughout the area is completely belied by the Commission's Report.

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[2] For the Commission's adoption of the Examiner's Report, see our Motion to Affirm, App. B, p. 6a.

The Commission fully and carefully considered this fact. It then proceeded to analyze, with a specificity which compares quite favorably to that of the Department's Memorandum, the extent to which the Seaboard and the Coast Line, by reason of the nature of their routes, actually were competitive with each other, and the extent to which they were not. (320 I.C.C., at 164, 211-12) The Commission then considered together with the actual elimination of competition in the region, the remaining rail competition that would be in effect after the merger, the competition from other modes of transport, and the benefits in terms of a strengthened rail transportation system—benefits which will be felt on a region-wide basis. (320 I.C.C., at 166) These area-wide benefits for "rail patrons and the public generally" (320 I.C.C., at 161), included such factors as "increased efficiency of operations, more flexible and regular schedules, faster service" (320 I.C.C., at 159), lower rates, elimination of certain charges, more adequate car supply, and a host of others. (320 I.C.C., at 159-61) In the light of all these factors,[3] the Commission made an overall judgment as to whether the merger—conditioned so as to maintain balanced rail competition—would be consistent with the public interest. (320 I.C.C., at 188, 207-12)

The Department may have a quarrel with the weight which the Commission put on the relative importance of maintaining region-wide competition between the Seaboard and the Coast Line (320 I.C.C., at 166-67);[4] but that quar-

[3] Near the close of its 91-page Report, the Commission stated: "we have made a searching analysis of each and every substantial issue presented in this proceeding and have carefully weighed the potential advantages and disadvantages that may reasonably be expected to result from the merger." (320 I.C.C., at 206)

[4] The general remarks of the Commission as to the effects of intermodal competition on the level of competition necessary among the railroads themselves, together with the Commission's observa-

rel does not present an issue for the courts. What the Department is doing here, we submit, is confusing the Commission's failure to agree with its contention as to the weight to be given the factor of preservation of a third rail system in the region with a failure to recognize that factor altogether. The Commission recognized that factor; but, as its Report makes plain (320 I.C.C., at 210-12), it weighed the other factors against it, and chose, on balance, to prefer those other factors to it—though only after applying conditions designed to strengthen the position of the region's second rail system.[5] Such a choice gives rise to no issue which could warrant plenary review by this Court. See, *e.g.*, *Illinois Cent. R. Co.* v. *Norfolk & Western R. Co.*, Nov. 14, 1966, Nos. 15, 17 & 20, O.T. 1966, 35 U.S. Law Week 4008, 4010-11; *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87-88 (1944); *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 482 (1942); *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286-87 (1934); *Virginian R. Co.* v. *United States*, 272 U.S. 658, 665-66 (1926).

Second. The Department next (U.S. Memo 6-7) complains of the detail and particularity in which the Commission analyzed the effects of intermodal competition within central and western Florida.

In this contention, the Department suggests (U.S. Memo 6) that it was only by reference to intermodal competition that the Commission justified the creation of an origina-

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tions as to the regulated nature of the rail industry, were of course relevant to its weighting of these factors. See 320 I.C.C., at 166-67, 210.

[5] Indeed, the whole body of the conditions imposed by the Commission on the merger so effectively resolved the adverse competitive factors that many rail carriers which had intervened in the proceedings before the Commission terminated their opposition after the conditions were prescribed.

tion-point rail monopoly within central and western Florida. But this is not the case. The Commission affirmatively dealt with the special situation in central and western Florida. Recognizing that the real nature of competition in the rail industry is not origination-point competition but route competition for the long haul, the Commission made all of central and western Florida open, for the first time, to Southern's freight solicitation, by imposing Condition 8 on the merger.[6] It is not, as the Department suggests, simply "the availability of service by trucks or barges" (not to mention ships and mixed truck-water or rail-water moves) which upon the merger will shield the Florida shippers from "the injurious effects of a rail monopoly" (U.S. Memo 7),[7] but the fact that if those shippers are not happy with the services of the Merged Carrier, they will be able to make the Merged Carrier short-haul itself by specifying carriage by Southern on the beyond-Jacksonville segment of their rail movements.

Central to the Department's call for more analysis on the degree of intermodal competition in central and west-

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[6] As the Examiner's Report, adopted by the Commission, observed:

> "The arguments presented by Justice ignore many facts of life in the railroad industry. Generally, the important revenue producing traffic is that which generates long hauls . . . . On such traffic, the through movement is handled successively by many railroads, and the competition which exists is between available routes rather than between the railroads concerned. Often, railroads which do not serve the same areas beyond common gateway points are in position to, and actually do compete with each other. . . . More often than not, the primary aspect of competition having bearing on the movement of important long-haul traffic involves the question of which railroad is able to convince the persons responsible for the routing of the most desirable traffic, to designate the specific routes most favorable to the soliciting railroad." (Ex. Rep. fol. 153)

[7] The overwhelming majority of the Florida shippers in fact supported the merger. (320 I.C.C., at 160-62; 165; Ex. Rep. fol. 41-45, 124)

ern Florida is what it describes as its "belief" that "a more probing inquiry by the Commission would have revealed that the railroads continue to enjoy substantial monopoly power in the long-haul transportation of many important commodities produced in the affected area. . . . " (U.S. Memo 6)—With all due respect to the Department's "beliefs" on the subject, they are contradicted by the evidence of record. The Commission did not, as the Department charges, "*presume* the efficacy of intermodal competition" (U.S. Memo 7; emphasis original); its findings as to its efficacy (320 I.C.C., at 149-54, 166, 210-11) were based on substantial evidence. That evidence, as to the area in question[8] included, among other things, documentation to the effect: that of the concrete aggregates, sand and gravel shipped by Florida's largest shipper of these commodities, 30% moved by truck[9] (Statement X, pp. 3-4); that at a large fertilizer company with four locations in the territory served by the Seaboard and the Coast Line (Tr. 1994), two-thirds of the inbound raw materials come in by water, including all of the phosphate rock arriving from the Florida mines[10] (Tr. 1999); that the same company ships 29% of its outgoing fertilizer from its Florida plant by truck (Tr. 1999); that a very large packing plant, accounting for 10% of Florida's canned citrus crop and 5% of the frozen citrus crop, used trucks to ship 46% and used

[8] Special studies as to the central and western Florida intermodal competition situation were presented to the Commission in rebuttal. See Statement BW; Ex. H-252. A portion of the general material on intermodal competition also relates to this area.

[9] Prior to 1947, none of these commodities moved by truck. (Statement X, pp. 4-5)

[10] The Florida rail carriers do not even appear generally to get the short haul on this movement from the mines to the port of Tampa. This shipper has provided, or has had provided for it, extensive facilities for the movement of phosphate rock from the mines to the port by truck, and for its transshipment from truck to water at Tampa. (Tr. 2003)

water carriage to ship 5% of its production (Statement AA, pp. 2-3); that even as to shipments *in excess of 100 miles,* trucks carry 18.8% of the fertilizer and fertilizer products, 30% of the building products, and 92.1% of the papermill products (Statement C, p. 32; Ex. H-36, St. U);[11] that at a number of major Florida points, trucks carried 65% or more of the combined rail and truck traffic (Statement C, pp. 30-31; Ex. H-36, St. T); that there was between 1956 and 1958 a 267% increase in the movement of superphosphate from Florida to Gulf and Mississippi River points by barge, necessitating drastic reductions in rail rates by the railroads in an effort to compete (Statement C, p. 35); that despite general freight rate increases during the five years from 1956 to 1960, there was a downward movement in the freight revenue per ton on a number of the bulk-loading commodities shipped to and from Tampa, including commodities such as sand and gravel, stone and rock, cement, phosphate rock, and superphosphate (Statement BW, p. 2; Ex. H-252, St. A, sheets 1 and 3, St. G, sheet 5); that because of truck competition, the freight rates on sulfur moving in the central and western Florida area had been driven down, with revenue per ton mile dropping from 2.7 cents to less than one cent (Statement BW, pp. 14, 17-18; Ex. H-252, St. G, sheet 2); that rail traffic originating in the Tampa area *not* involving a water movement (*i.e.,* that on which the railroads kept the long haul), actually declined between 1956 and 1960 both in absolute terms and in terms of revenue per ton (Statement BW, p. 4; Ex. H-252, St. A, sheet 3); that while the amount of tonnage of phosphate in the area moving at least part way by rail increased by 18.3% in

[11] These particular statistics were based on a survey of twenty-one points in the applicants' territory, ten of which were in Florida. (Statement C, pp. 24-25) The other statistics we relate at this point are specifically pointed at Florida.

the period from 1956 to 1960, the gross rail revenues increased by only 5.5% (Statement BW, p. 12; Ex. H-268; Ex. H-252, St. F); that rail revenues per ton on inbound trans-shipped movements ex-water at Tampa declined from $1.35 to $1.18 in the five years before the application, indicating the competitive pressures even on the short haul (Statement BW, p. 4; Ex. H-252, St. A, sheet 4); and that, in general, the revenue yield on the heavy bulk-loading commodities in central and western Florida was under a considerable squeeze from competition from other modes of transport—truck, barge, and ship movements and mixed movements with rail getting the short haul or no haul at all—during the years before the filing of the merger application (Statement BW, pp. 13-15; Ex. H-249; Ex. 250; Ex. 251; Ex. H-252, St. G, sheet 1; Ex. 259; Ex. 260; Ex. 261; Ex. 262)—All of this indicates a strange sort of "monopoly power" (U.S. Memo 6) on the railroads' part.

Thus, the record reflects the massive intermodal competition—even on low-rated, bulk-loading commodities which are in the popular mind[12] thought of as the exclusive property of the railroads—which has increasingly affected the railroads with respect to central and western Florida in recent years. There is no hard core of traffic any longer assured to the railroads. (Statement BW, pp. 19-20) Accordingly, despite the Department's assertion, the Commission did not "presume" that the railroads were under pressure from intermodal competition in central and western Florida. (U.S. Memo 7) It *found* that they were.

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[12] The Justice Department's Memorandum apparently reflects this erroneous preconception. Perhaps had the Department been more than sporadic in its attendance at the Commission hearings, it would have become better apprised of the "facts of life in the railroad industry." See our Motion to Affirm, p. 16 n. 10; for the quotation, see Ex. Rep. fol. 153.

(320 I.C.C., at 153; see also Ex. Rep. fol. 38) As even the brief review of the highlights which we have just made suggests, that finding was made on the most substantial of evidence, as were the Commission's more general findings that the overall level of intermodal transport competition necessitated strengthening the rail carriers through merger. (320 I.C.C., at 166-67; 210; 211-12)

Third. The Department also complains (U.S. Memo 7) that the Commission should have made findings in further detail as to the rail monopoly to be created by the merger in central and western Florida. It is hard to see the purpose of further findings on this subject. The Commission in fact found that there would be a rail monopoly (in terms of origination-point service) created by the merger in the Tampa area and generally in central and western Florida. (320 I.C.C., at 164-65) No one seriously disputed this or could dispute it. Why the Commission should have, in order further to elucidate a subject as to which there was no dispute, proceeded to make detailed findings as to the names of all the cities and towns from which rail shipments move in the area and as to the names of the different products originating in each one (U.S. Memo 7) is mysterious.[18]

The Commission, instead, proceeded to remedy this practical problem not by spinning out a census of shippers or otherwise multiplying details but by a practical solution: the imposition of the Jacksonville gateway condi-

[18] In similar vein is the Department's complaint that the Commission "did not attempt to determine how many shippers would be denied competitive rail service." (U.S. Memo 7) Since the Commission recognized that there would be a rail monopoly created in the entire central and western Florida area, thereby ending such origination-point rail competition as existed within the area, the suggestion that it should have run an exact count on the number of shippers involved appears to contemplate essentially a make-work project.

tion (Condition 8), which would provide *all* rail shippers in this area—regardless of the commodities involved or the specific origination points of the shipments—access to competing rail service for the long haul; namely, service by the Southern for the segment "beyond" Jacksonville.[14] (320 I.C.C., at 180-84) We cannot appreciate why the Department believes that it would have been preferable for the Commission to have proliferated findings as to the extent of the origination-point rail monopoly which would admittedly be created by the merger within central and western Florida, rather than devise, as it did, a practical solution to the monopoly problem which would permit the overall benefits of the merger to the southeastern United States to be realized while providing balanced competition for the long haul on rail movements commencing or terminating within the Florida problem area.[15] This, again, is simply another instance of the fundamental mistake which the Department and the appellants make of confusing judicial proceedings under a prohibitory statute, like Section 7 of the Clayton Act, with administrative proceedings under Section 5 of the Interstate Commerce Act, where the agency has the power of developing through its adminis-

[14] Thus the merger, as the Commission suggested (320 I.C.C., at 188) would make many Florida shippers better off than before, in terms of rail competition. For Seaboard and Coast Line compete at relatively few origination points in the area; and with the Jacksonville gateway closed, a shipper in a town served only by one of them would be restricted to the services of the carrier who happened to serve his town. (320 I.C.C., at 182)

[15] Condition 12 imposed on the merger (see our Motion to Affirm, p. 7 n. 5, pp. 33-34), which requires the Merged Carrier to grant the Central of Georgia (a Southern subsidiary) trackage rights between Albany and Tifton, Georgia, also helps provide a practical solution to the Florida situation by improving the alternative routes available to Florida shippers in the beyond-Jacksonville "long haul" movement. This matter is, as the Commission pointed out, "closely related to the opening of the Jacksonville gateway." (320 I.C.C., at 183)

trative tools a practical solution to the competitive "danger zones" in a proposal brought before it.[18]

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The Department in general expresses concern that in passing on the merger, the Commission, with respect to the competitive factor, did not act "with its eyes open." (U.S. Memo 8) But we submit that any impartial review of the Commission's Report would lead to the same conclusion as the District Court reached: That "the ICC has clearly realized the danger zones in this merger and after analyzing the problem has chosen what it concludes to be more important public benefits." (FEC 38a)

The Commission's careful Report is itself the best evidence of its concern for the danger zones in terms of the competitive factor. Perhaps the best illustration of this would be to put in context the Commission's observation, quoted out of context by the Department, that "such reduction in competition as will result from the merger will have no appreciably injurious effect upon shippers and communities." (U.S. Memo 8, quoting from 320 I.C.C., at 167)—A full reading of this page of the Commission's Report makes it clear that the Commission is here referring to the merger *only in the light of the protective conditions which it imposed.* The Commission's basic judgment of the competitive factor and the other public interest factors involved in the merger is expressed elsewhere on that page:

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[18] Besides the Commission's discussion of the conditions which it actually imposed, it also considered other aspects of the practical problems which the merger would create in Florida, and discussed the practicalities of solving them. See 320 I.C.C., at 152-53; 172-75 (effect on FEC); 186-87 (consideration of Southern's "track transfer" proposal); 208-10. The Examiner's Report also discusses the practicalities of the situation in Florida. (Ex. Rep. fol. 34-35; 48-73; 77-79; 120-21; 126-27)

> "Absent suitable protective conditions and consideration of these factors [the countervailing public-interest factors], there is a distinct possibility that the proposed transaction would tend to lessen competition to an extent which would contravene the policy underlying the antitrust laws. Here, however, it is clear that the benefits of this merger, *when viewed in the light of the conditions hereinafter imposed,* will greatly outweigh the potential injuries and hence the policy underlying the antitrust laws does not represent a barrier to its approval." (320 I.C.C., at 167; emphasis supplied)

It is then perfectly plain that the Commission, in conditionally approving the merger, acted "with its eyes open" to the competitive and other public-interest factors.[17]

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[17] On November 23, 1966, the Tampa Port Authority filed a "Brief Amicus Curiae" in this Court supporting the position of appellants. This was the first appearance of Tampa Port Authority in the 2½ year course of these judicial review proceedings. The sole argument of Tampa is the argument, not made by any of the parties to the case, that certain findings of the Commission are not supported by substantial evidence on the record viewed as a whole. In support of its allegations, Tampa Port Authority makes no analysis of the record before the Commission but simply alleges, on the basis of unsupported assertions as to matters of fact outside the record, that the conclusions of the Commission's Report are in error. We see no purpose to be served by making reply to such a document. The "Brief Amicus Curiae" on its face demonstrates that the real concern of Tampa Port Authority is with certain other proceedings pending before the Commission, in which Coast Line and Seaboard as individual carriers are parties, and which proceedings have no relation whatsoever with the merger. To the extent that Tampa Port Authority has any valid grievance with respect to the Commission's handling of those other cases, it can, of course, seek judicial review when final orders of the Commission are rendered in them.

CONCLUSION

We submit that the nature of the few specifics which the Department's Memorandum raises is itself a clear indication of the absence of any basis for further review of the Commission's resolution of the public-interest factors involved in the proposed merger. Accordingly, for the reasons stated in our Motion to Affirm and herein, the judgment should be affirmed.

Respectfully submitted,

PAUL A. PORTER
DENNIS G. LYONS
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Appellees Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, The Atlantic Coast Line Company, and Mercantile-Safe Deposit and Trust Company

Of Counsel:

HAROLD J. GALLAGHER
WALTER H. BROWN, JR.
WILLKIE FARR GALLAGHER WALTON & FITZ GIBBON
New York, New York

RICHARD A. HOLLANDER
Richmond, Virginia

PRIME F. OSBORN, III
JOHN W. WELDON
PHIL C. BEVERLY
Jacksonville, Florida

EDWIN H. BURGESS
Baltimore, Maryland

ARNOLD & PORTER
Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 641

SOUTHERN RAILWAY SYSTEM, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Middle District of Florida, Jacksonville Division

APPELLANT'S REPLY MEMORANDUM

W. GRAHAM CLAYTOR, JR.
Box 1808
Washington, D. C. 20005

JOHN K. MALLORY, JR.
STEPHEN R. BARNETT
1250 Connecticut Ave., N. W.
Washington, D. C. 20036

Attorneys for Appellants
Southern Railway Co. et al.

Of Counsel:

WILLIAM D. MCLEAN
Washington, D. C.

JOHN B. MILLER
Savannah, Georgia

November 1966

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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On Appeal from the United States District Court for the Middle District of Florida, Jacksonville Division

APPELLANT'S REPLY MEMORANDUM

The appellees, Interstate Commerce Commission, Seaboard Air Line Railroad Company, and Atlantic Coast Line Railroad Company have moved to affirm summarily the judgment of the District Court in Appeals Nos. 638, 639 and 641. The Solicitor General, on behalf of the United States, has filed a memorandum suggesting that the case is one which warrants plenary consideration by this Court. The memorandum of the Solicitor General urges that the Commission's findings with respect to the anticompetitive consequences of the merger are seriously deficient with regard to both the Southeast as a whole and central and western Florida. The Solicitor General also

points to the error inherent in the Commission's assumption that the adverse effects of the Florida monopoly created by the merger would be largely offset by competition from other modes of transportation.

Aside from the errors on the part of the Commission in dealing with the anticompetitive aspects of the merger throughout the southeast as a whole, and aside from the other errors of the Commission, all discussed in our jurisdictional statement, Southern believes it would serve a useful purpose to reply briefly to the appellees' contentions concerning the adequacy of the Commission's findings as to the anticompetitive aspects of the merger in central and western Florida and in the carriage of long-haul, bulk-loading commodities.

Appellees argue that the Commission applied proper standards and made adequate findings based on substantial evidence in performing its duty "to estimate the scope and appraise the effects of the curtailment of competition" cause by the merger, and appellees argue that any suggestion that the Commission is required to make a more meaningful analysis of the anticompetitive effects of the merger is but an argument that the Commission must apply Section 7 of the Clayton Act standards in a merger proceeding. I.C.C. 8-9; SAL-ACL 17, 25.)[1]

There is no dispute and no issue in the case that it is the Commission that has been designated by Congress to determine public interest. The Commission is the agency which must balance the adverse competitive effects of a merger against the benefits and determine whether the benefits outweigh the anticompeti-

[1] References such as this are to the page numbers of the Motions to Affirm filed by the ICC and the merging railroads.

tive consequences. This function is properly performed when the Commission applies proper standards and makes adequate findings based on substantial evidence. Southern also agrees that the Commission need not determine whether Section 7 of the Clayton Act is violated by the merger nor is the Commission restricted to the application of Section 7 standards alone in appraising the anticompetitive effects of the merger.

However, we submit that it is equally clear that the Commission cannot determine public interest without first making a proper and meaningful determination of the anticompetitive effects of the merger. The Commission must evaluate the extent of the anticompetitive effects in order to determine what this Court termed the ultimate question—"whether the merger would be consistent with the public interest despite the foreseeable injury to competition." 382 U.S. 154, 156 (1965). Until the Commission makes some estimate of the magnitude and analysis of the effects of the injury to competition it cannot possibly determine whether it is in the public interest to allow such injury. We agree with the Solicitor General that the Commission failed even to attempt such an estimation, particularly with regard to the anticompetitive effects of the merger in central and western Florida and with respect to the carriage of bulk commodities in which the railroads have a substantial inherent advantage over other modes of transportation.

The appellees contend that to require the Commission to do more than make the obvious finding that "monopoly" will exist in central and western Florida and that there will be a "significant" reduction of rail competition in Florida is to compel the Commission to utilize the "product and market" analysis of anti-

trust cases. (I.C.C. 10, SAL-ACL 25-27.) While such an analysis would undoubtedly have revealed the scope and effects of the merger, this argument, we believe, grossly overstates the consequences of requiring the Commission to do more than merely apply such labels to the competitive consequences of a merger that will eliminate for all time rail competition in this important freight-generating area of the country. We submit that, completely aside from antitrust analysis, the Commission under *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87 (1944), must "estimate the scope and appraise the effects" of the reduction of competition. The Commission does not comply with this responsibility simply by labelling the reduction of competition as "monopoly" or as "significant" (320 I.C.C. at 165, 166), without making some measurement and giving some indications in findings as to the scope or magnitude and possible effects of the reduction. The Commission certainly does not appraise the effects of the monopoly, as required by *McLean,* by the cryptic finding that the monopoly created would "merely" supplant the "duopoly" presently existing in central and western Florida. (320 I.C.C. at 165.) Nor does the Commission appraise the effects of monopoly by its finding that the existing two-carrier competition (termed "duopoly") has not had appreciable adverse competitive effects upon the communities or the shipping public."[2] (320 I.C.C. at 165.) To as-

[2] The I.C.C. contends in its motion (I.C.C. 10) that the "effects upon communities or the shipping public" that would result from the rail monopoly were appraised by the Commission. This is not the case. The Commission's finding quoted in part by the I.C.C. in its brief, dealt explicitly with the effects of presently existing two-carrier competition on the communities and the shipping public, not with the effects of the monopoly that would be created by the merger. (320 I.C.C. at 165.)

sume that, because two-carrier competition has not resulted in adverse effects, absolutely monopoly will likewise not result in adverse effects, is to ignore completely the benefits of competition and assumes that monopoly is as desirable as competition under the National Transportation Act. Such denigration of competition pervades the Commission's entire determination of public interest.

Appellees seek to support the lack of meaningful findings as to the scope and effects of the rail monopoly that will be created by the merger by pointing to the Commission's findings on intermodal competition. The I.C.C. contends that requiring the Commission to estimate the scope and appraise the effects of reduction of *rail* competition imposes an "antitrust approach" on the Commission. (I.C.C. 9-10.) Both the I.C.C. and the merging railroads point to the Commission's general findings on intermodal competition and to its somewhat more specific findings on phosphate rock to show that intermodal competition eliminates the need for an evaluation of rail competition in central and western Florida. (I.C.C. 9, SAL-ACL 26-27.)

Here, however, the argument leads the appellees to abandon the lower court decision which they seek to have affirmed. The lower court made it abundantly clear that "railroads have a decided economic advantage in carrying long-haul, heavy bulk products" (FEC App. p. 18a-19a) and that "railroads enjoy a decided economic advantage over all other modes of transport in heavy, long, bulk-haul products in central and western Florida." FEC App. p. 20a. The Commission itself, in a later merger case, recognized the importance of evaluating the scope and effects of the reduction of rail competition in relation to these commodities which are so dependent on rail transportation.

In the *Great Northern* case, Finance Docket No. 21478, . . . I.C.C. . . ., decided March 31, 1966 (mimeograph opinion), the Commission held that in "heavy loading, low-value bulk commodities" and in "many long haul movements", "rail transportation must be considered a distinctive market in its own right." Mimeo. opinion, p. 73. Furthermore, the lower court also rejected the argument made by the appellees before that court and now made in appellees' motions (I.C.C. 9, SAL-ACL 26-27), that water carriers supply a competitive mode of transport for phosphate rock and other bulk commodities and that such competition is evidenced by the railroads having had to reduce rates to meet such competition. The court dealt with this argument, stating that "the record in this case does demonstrate that barges are not physically interchangeable with railroads as a major competitive mode of phosphate transportation. Barges are not able to serve interior points on phosphate, nor are they able to serve facilities that have special equipment designed solely for loading or unloading rail shipments." FEC App. p. 20a. The court points to the fact that railroads are able to divert business from water carriers even though rail rates are substantially higher.[3] Thus, the attempt of the appellee railroads to urge the existence of "ubiquitous intermodal competition" (SAL-ACL 27, n. 20) in the carriage of these bulk commodities is completely at odds with the lower court's opinion and finds no support in findings in the Commission's report.

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[3] The Court also pointed out that the Commission's finding that the revenue per ton for the carriage of phosphate rock had declined between 1956 and 1960 "may only indicate that the railroads have priced themselves at a level where cross-elasticity of demand with other modes of carriage will take place." FEC App. p. 20a n. 28.

The appellee railroads, in their motion to affirm, inquire as to the purpose of requiring the Commission to make more specific findings as to the anticompetitive effects of this merger and imply that such a requirement is futile. (SAL-ACL 25.). While the Commission can approve a merger if it makes proper findings that the merger will be consistent with the public interest, one cannot assume that the Commission's balancing of the public interest would have been the same in the face of adequate findings which would have revealed the great magnitude of the reduction of competition being imposed by this merger. In any event, the Commission should be required to perform this function of balancing the benefits of the merger against the injury to competition with an awareness as to the scope and effects of the injury. It has not done so and it certainly cannot be assumed that a balancing accomplished after consideration of the scope and effects of the reduction of competition would bring about the same results as a balancing performed without such consideration.[4]

[4] As a result of a labor agreement just entered into between the unions and the merging carriers, basically an "attrition agreement," even the financial benefits, the "foremost" benefits of the merger (320 I.C.C. at 206-207), are thrown in serious doubt. It would appear that the balancing of public benefits against the foreseeable injury to competition has been substantially changed by the merging carriers. This is particularly true since the Commission had occasion to find in its report (320 I.C.C. at 201) that the cost of attrition provisions would be prohibitive, that it could not find that attrition was in the public interest and that attrition in this case was contrary to the National Transportation Policy. Surely this requires that the Commission, in making more meaningful findings on the anticompetitive effects of the merger, rebalance this with the now changed "benefits" to be derived from the merger.

There is a particularly compelling purpose in this case for requiring the Commission to consider and make findings concerning the scope and effects of the rail monopoly in central and western Florida and in the carriage of these few bulk loading commodities that are so important to that area and that account for more than 75 percent of the total tonnage of the two railroads. In this case, the Commission had available a means whereby it could approve the merger, give applicants nearly all of the benefits of merger and yet retain rail competition in that area in the carriage of such commodities. Southern opposed the merger unless it were conditioned on the merged carrier leasing or selling to Southern or some other qualified carrier a line of railroad between Jacksonville, Florida and central and western Florida. Had the Commission estimated the scope and appraised the effects of the rail monopoly to be created by the merger, its decision might well have been influenced as to whether to impose this condition in order to avoid the severe anticompetitive consequences that would have become apparent. Certainly, consideration by the Commission as to the scope and effects of this monopoly would have prevented the Commission from denying the condition primarily on the ground that providing competition with the merged carrier in this area would amount to an "invasion of territory" by Southern. (320 I.C.C. at 187, 209-210.)

The Commission in its motion to affirm ignores completely this basic justification given by the Commission for the denial of the condition and seeks instead to justify the Commission's denial on the grounds that the granting of the condition would cause "dismemberment of the merged company's lines, interfere with the

merged company's planned economies, and in general frustrate the over-all objectives of the merger, all to the detriment of the public interest." (I.C.C. 14.) While it is clear from reading the Commission's report that these reasons are not "basic" to the Commission's determination, even the secondary reliance on them by the Commission is dissipated by an examination of the underlying facts. The Examiner's report shows that less than 25 percent of the alleged savings by the merged carrier would be eliminated by providing competition in this area. (Ex. Rep. fol. 78.) The merged company's lines would not be dismembered since Southern suggested that the merged company could continue to use the one line leased or sold under the proposed condition, and of course there are presently two and frequently more parallel lines in this area owned by the two railroads. The over-all objectives of the merger could not possibly be frustrated since the merged carriers could nevertheless consolidate facilities in central and western Florida as well as in the rest of the area in which they operate.[5] Indeed, the merged company can, without monopoly, obtain substantially all of the planned economies and benefits to be derived from the merger. Obviously, Southern's competition would deprive the merged company of some revenue on traffic originating and terminating in this area, but that is the goal of effective competition which, the Commission seems to forget, is to be considered a public benefit.

We submit that the motions to affirm filed by the I.C.C. and the private appellees should be denied and

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[5] Compare *Great Northern* case, *supra*, p. 6, where the Commission considered and found that very substantial savings could be realized without merger. Mimeo. opinion, p. 62.

the Court should note probable jurisdiction so that plenary consideration can be given to the important issues present in the case.

Respectfully submitted,

W. GRAHAM CLAYTOR, JR.
Box 1808
Washington, D. C. 20005

JOHN K. MALLORY, JR.
STEPHEN R. BARNETT
1250 Connecticut Ave., N. W.
Washington, D. C. 20036

Attorneys for Appellants
Southern Railway Co. et al.

Of Counsel:

WILLIAM D. MCLEAN
Washington, D. C.

JOHN B. MILLER
Savannah, Georgia

November 1966

FILED
DEC 2 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Nos. 638, 639 and 641

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant,*

v.

UNITED STATES OF AMERICA, *et al.,* *Appellees.*

CITY OF TAMPA, FLORIDA, *Appellant,*

v.

UNITED STATES OF AMERICA, *et al.,* *Appellees.*

SOUTHERN RAILWAY SYSTEM, *Appellant,*

v.

UNITED STATES OF AMERICA, *et al.,* *Appellees.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

SUPPLEMENTAL MEMORANDUM IN RESPONSE TO NEW MATERIAL IN APPELLANTS' REPLIES

PAUL A. PORTER
DENNIS G. LYONS
1229 Nineteenth Street, N.W.
Washington, D. C. 20036
Attorneys for Appellees Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, The Atlantic Coast Line Company, and Mercantile-Safe Deposit and Trust Company

Of Counsel:

HAROLD J. GALLAGHER
WALTER H. BROWN, JR.
WILLKIE FARR GALLAGHER WALTON & FITZ GIBBON
New York, New York

RICHARD A. HOLLANDER
Richmond, Virginia

PRIME F. OSBORN, III
JOHN W. WELDON
PHIL C. BEVERLY
Jacksonville, Florida

EDWIN H. BURGESS
Baltimore, Maryland

ARNOLD & PORTER
Washington, D. C.

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

SUPPLEMENTAL MEMORANDUM IN RESPONSE TO NEW MATERIAL IN APPELLANTS' REPLIES

We ordinarily would hesitate at this time to burden the Court with a further filing in this case, the docket in which has already been the recipient of much more material than the well-settled legal issues involved would require. But a contention made for the first time in reply by certain of

the appellants (FEC Rep. 3-5; Southern Rep. 7 n. 4) prompts this brief supplemental memorandum.

Appellants' extraordinary contention is that the merger applicants, by agreement with the representatives of their employees, may have voluntarily given away a substantial amount of the savings to be realized from the merger, and that the possibility of this donation vitiates the Commission's findings with respect to certain of the benefits to be obtained from the merger. This contention is completely without merit; and even an exploratory acceptance of it would seriously hamper the smooth functioning of labor relations in the railroad industry—particularly as the industry reduces the number of its units through the unifications contemplated by Section 5 of the Interstate Commerce Act—and would run counter to the policy of the Railway Labor Act.

Section 5(2)(f) of the Interstate Commerce Act, relating to rail mergers and consolidations, provides that:

> "In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order."

The Act makes it perfectly plain, in line with the national labor policy of encouraging agreed-on arrangements

of labor-management relations,[1] that, notwithstanding "any of the provisions of this Act," with respect to a merger "an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." (§ 5(2)(f), final sentence)

What the merger applicants did here was to enter into an agreement with their employees which, with certain specified exceptions, continued the protections specified in the statute for a period longer than the four years required by the statute, or the five years with respect to which the Commission now characteristically grants employee protection.[2] (See, *e.g., New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271 (1952); *Southern R. Co.-Control-Central of Georgia R. Co.,* 317 I.C.C. 557, 729 (1962-63).) The protections now are to continue until employees are separated by resignation, death, retirement, dismissal for cause, failure to work by reason of disability, or discipline, or failure to exercise seniority rights. But the agreement did not stop there. In exchange for this concession—that the protective provisions would extend to employees beyond the fourth or fifth year after the merger—the merger applicants received the highly valuable right to make reassignments of employees across craft lines and from place to place throughout the entire merged system, commencing on the effective date of the merger.[3] Moreover, that agreement also gave the merger

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[1] See, *e.g., California* v. *Taylor,* 353 U.S. 553, 559 (1957).

[2] See, generally, § 2 of the Agreement. The full text of the Agreement is appended as Appendix I.

[3] See, primarily, § 3 of the Agreement. We have appended the entire text of the Agreement as Appendix I hereto. We note that the FEC Reply simply appended a summary description of the

applicants the right to combine seniority rosters and seniority districts—a right which is most important in connection with the gaining of the maximum possible savings in connection with the merger. These were rights which the carriers' managements did not possess under previous agreements and do not now possess apart from the recent agreement: as is well known, the inflexibility of railroad labor costs because of restrictive work practices, craft lines, seniority rosters, and work rules is the principal problem of railroad management in the railway labor area. The arrangement which the carriers have negotiated, by greatly increasing the managerial flexibility of the Merged Carrier, will enable the Merged Carrier to take a greater advantage of the potential savings of the merger *from the effective date of the merger*—not for the first time in the fifth year after the merger or in the sixth year thereafter. The agreement provides a measure of flexibility that would have been important enough in the unmerged operations of the applicants, but which acquires a special significance in the context of the merger.

To be sure, as appellants point out, the Commission quite properly declined to impose highly burdensome long-term "attrition" conditions on the Merged Carrier when those conditions, *without reciprocal concessions,* were proposed by railway labor in the merger hearings. The Commission then stated that "we are unable to conclude that conditions requiring the retention of unnecessary employees in unnecessary positions would be consistent with the public

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Agreement in the form contained in "The Atlantic Coast Line News," a periodical published for the "information of the employees of The Atlantic Coast Line Railroad Company." This summary did not stress the corresponding benefits which the Merged Carrier is to receive from the Agreement.

interest or sound business policy. The imposition of such conditions would unduly restrict carriers in the establishment of more economic operations. . . ." 321 I.C.C., at 201. The Commission's language ran to the conditions, *unaccompanied by any reciprocal concessions,* as proposed by the brotherhoods for unilateral imposition by the Commission on the merger. The brotherhoods' proposal contained none of the present liberal provisions for reassignment and for management flexibility, eliminating the necessity for the "retention of unnecessary employees in unnecessary positions" and permitting the carriers to effect the "establishment of more economical operations," which are provided for in the present agreement.

Directly opposite to the contentions of appellants, then, are the facts. Rather than reduce savings from labor costs, the agreement will enhance them. The record shows (Exhibit H-37, Study 10, Schedule A) that the normally-expectable attrition during the five-year period following the merger exceeds the number of personnel to be displaced by the merger by 1,413. Under the Commission's prescribed protective conditions, the displaced employees would have been given full protection; the record also shows that 969 of them could not have been used, however, in their own craft or class and hence would have had to be compensated in accordance with the prescribed conditions without performing any beneficial services because of the inability of the carrier to assign them to useful positions. Under the terms of the present agreement, however, these employees could be transferred to necessary positions outside their craft and class to fill other available jobs created by attrition.

The Commission's rejection, as not in the public interest, of a proposed mandatory "attrition" set of conditions,

then, created a "base" from which the carriers were able to negotiate an overall settlement that would preserve the necessary flexibility which would permit them to take immediate advantage of the potential savings in the merger. Certainly it is to be expected that an agreement "tailor-made" by labor and management will provide a more desirable charter for the labor-management relations of the Merged Carrier than a set of labor-protective conditions unilaterally imposed by the Commission. Thus it is that a number of rail carriers have entered into agreements with the brotherhoods under the provisions of the final sentence of Section 5(2)(f), providing arrangements for their labor relations to govern after the effectiveness of a transaction approved by the Commission under Section 5. This was the case in the mergers involved in *Norfolk & W. R. Co. & New York, C. & St. L. R. Co.-Merger,* 324 I.C.C. 1 (1964); *Norfolk & W. R. Co. Merger,* 307 I.C.C. 401 (1959) (Virginian merger); and *Pennsylvania R. Co.-Merger-New York Cent. R. Co.,* 327 I.C.C. 475 (1966).

At the time the present agreement was reached (pending appeal to this Court, following the filing of the Jurisdictional Statement in No. 640), the representatives of railway labor were no longer actively pursuing the legal issue whether the Commission erred in failing to require "attrition" conditions. The only questions they were raising were entirely unrelated to "attrition" conditions. (See Jurisdictional Statement, No. 640, pp. 3-4.) Thus, the overall arrangement reached between the merger applicants and railway labor—which resulted in a settlement of the unrelated points which were then being pressed on appeal—did not represent a compromise of a preserved position by railway labor that attrition conditions should be imposed without any counterbalancing flexibility in management discretion over the affairs of the Merged Carrier.

To say that a voluntary settlement of the labor relations to prevail upon the consummation of a railway merger vitiates the Commission's order approving the merger flies in the face of the policy established by the last sentence of Section 5(2)(f) encouraging such voluntary settlements. If they vitiated the Commission's order, such agreements would not be entered into. Since the savings to result from a rail unification are often a principal basis of the Commission's approval (see, *e.g., Texas* v. *United States,* 292 U.S. 521, 530-31 (1934); *Seaboard Air Line R. Co.* v. *Daniel,* 333 U.S. 118, 124-25 (1948); *Louisville & N. R. Co. Merger,* 295 I.C.C. 457, 502-03 (1957); *Duluth, S. S. & A. R. Co.,* 312 I.C.C. 341, 360 (1960)), it follows that if such an agreement vitiates a Commission order here, it would almost invariably vitiate the Commission's orders, contrary to the policy expressed in the final sentence of Section 5(2)(f). The result would not only frustrate the procedure wisely contemplated by this provision, but would impair the whole policy of the Railway Labor Act for the continuing voluntary adjustment of railway labor-management relations.[4] This is not the first rail merger case in which an overall labor settlement was not made final until after the rendition of the Commission's report.[5] Surely, given the

[4] The Railway Labor Act imposes upon carriers and employees the duty to "exert every reasonable effort" to enter into collective bargaining agreements and to continue their effectiveness, as a means of ordering their industrial relations. See Section 2 *First,* 45 U.S.C. § 152 *First.*

[5] In the Pennsylvania-New York Central merger (*Pennsylvania R. Co.-Merger-New York Cent. R. Co.,* 327 I.C.C. 475 (1966)), there was an agreement entered into with the brotherhoods under the final sentence of § 5(2)(f) prior to the Commission's order, and substantial modifications in the agreement were made by further agreement under that authority after the Commission's order.

backdrop of the national policy for the voluntary self-adjustment of these matters, it can be assumed that the carriers will not voluntarily surrender the public and private benefits to be obtained from the merger by making inordinate concessions to their employees, whether before the effective date of the merger by an agreement under the last sentence of Section 5(2)(f), or by an agreement entered into under the normal processes of the Railway Labor Act after the effective date of the merger.

Significantly, the Commission—which has an interest in the integrity of its own processes—has made no suggestion that the basis for its order has been vitiated because of any alleged subsequent conduct by the merger applicants voluntarily surrendering some of the savings to be effected upon the merger.

For the reasons stated, the eleventh-hour contention of appellants made directly in this Court that the merger applicants have voluntarily surrendered the benefits of the merger and vitiated the Commission's order is plainly insubstantial.

Respectfully submitted,

PAUL A. PORTER
DENNIS G. LYONS
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Appellees Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, The Atlantic Coast Line Company, and Mercantile-Safe Deposit and Trust Company

Of Counsel:

HAROLD J. GALLAGHER
WALTER H. BROWN, JR.
WILLKIE FARR GALLAGHER WALTON & FITZ GIBBON
New York, New York

RICHARD A. HOLLANDER
Richmond, Virginia

PRIME F. OSBORN, III
JOHN W. WELDON
PHIL C. BEVERLY
Jacksonville, Florida

EDWIN H. BURGESS
Baltimore, Maryland

ARNOLD & PORTER
Washington, D. C.

December, 1966

APPENDIX I

AGREEMENT
FOR PROTECTION OF EMPLOYEES
IN EVENT OF MERGER OF
SEABOARD AND COAST LINE RAILROADS

WHEREAS, the Seaboard Air Line Railroad Company and the Atlantic Coast Line Railroad Company (hereinafter sometimes referred to individually as Seaboard and Coast Line or collectively as the Carriers) have filed a joint application with the Interstate Commerce Commission (hereinafter called the Commission) for authority under Section 5(2) of the Interstate Commerce Act to merge the properties and franchises of Coast Line into Seaboard for ownership, management, and operation of the properties now separately owned and operated, and for certain other authority incidental thereto, as more fully described in Finance Docket's No. 21215;

AND WHEREAS, the said joint application has been approved by the Commission, but now is subject to review by the courts of the United States;

AND WHEREAS, the approved Plan of Merger dated May 19, 1960, between the Carriers provides that the corporation to survive the merger will be a corporation of the Commonwealth of Virginia with its name changed to "Seaboard Coast Line Railroad Company" (hereinafter referred to as the Merged Company) which will assume and be bound by the collectively bargained labor agreements of both Seaboard and Coast Line;

AND WHEREAS, upon court approval of the Commission's orders it is the intent and purpose of Seaboard and Coast Line to effectuate the merger, which may or will

have adverse effect upon their employees represented by the labor organization parties hereto;

AND WHEREAS, the international and national labor organizations signatory hereto are the authorized and recognized representatives of the majority of the employees of Seaboard and Coast Line and have intervened on behalf of said employees through the Railway Labor Executives' Association in opposition to the said merger in proceedings before the Commission and in the courts;

AND WHEREAS, Section 5(2)(f) of the Interstate Commerce Act provides:

> "As a condition of its approval, under this paragraph (2) of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad

and the duly authorized representative or representatives of its or their employees."

AND WHEREAS, pursuant to the provisions of the Railway Labor Act, as amended, and in accordance with the last sentence of Section 5(2)(f) of the Interstate Commerce Act above quoted, the parties signatory hereto have reached agreement respecting the protection to be afforded employees of the Seaboard and Coast Line;

NOW, THEREFORE, it is mutually agreed as follows:

Section 1.

The fundamental scope and purpose of this Agreement is (a) to provide for the protection of defined employees of Seaboard and Coast Line as herein set forth, (b) to expedite the changes in services, facilities and operations involved in such merger, and (c) to prescribe the procedures by which existing agreements between the parties shall be modified and consolidated to conform with the changes in services, facilities and operations involved in such merger.

Section 2.

(a) For the purposes of this Agreement the term "present employees" is defined to mean all employees of Seaboard or Coast Line who render any compensated service between the effective date of this Agreement and the date of consummation of the corporate merger (both dates inclusive).

(b) On the date the said corporate merger of the Coast Line into Seaboard is consummated the Merged Company will take into its employment all employees of Seaboard and Coast Line who were employees on the effective date of this Agreement, or subsequent thereto, up to and in-

cluding the date the merger is consummated, and who are willing to accept such employment. None of the present employees of either of the said carriers shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment.

(c) In the event two or more employees, including those on leave-of-absence or sick leave, have employment rights to the same job, the senior employee upon return to his position shall be entitled to preservation of employment and the employee temporarily occupying such position shall revert to whatever rights his seniority and this Agreement otherwise entitle him.

(d) The Merged Company shall also take over, assume and continue the employment relationship of all employees on furlough or leave-of-absence and preserve their rights and equities as they may exist as of the effective date of this Agreement or subsequent thereto up to and including the date the corporate merger is consummated subject, however, to the transfer of work and employees as hereinafter set forth.

(e) An employee shall not be regarded as deprived of employment or placed in a worse position with respect to his compensation, rules, working conditions, fringe benefits, or rights and privileges pertaining thereto (1) in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements, (2) or failure to work due to disability or discipline, (3) or failure to obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements, (4) or reductions in forces due to seasonal requirements,

provided, however, that employees furloughed due to seasonal requirements shall not be furloughed in any twelve-month period for a greater period than they were furloughed during the twelve months preceding the date the merger is consummated.

(f) In the event of a decline in the Merged Company's business in excess of 5% in the average percentage of both railway operating revenues and total ton miles revenue-freight in any 30-day period compared with the average of the same period for the years 1964 and 1965, a reduction in forces in the crafts represented by each of the organizations signatory hereto may be made at any time during a 30-day period following the period of decline below the number of employees entitled to preservation of employment under this Agreement to the extent of one percent for each one percent that such decline exceeds 5%. The average percentage of decline shall be the total of the percent of decline in railway operating revenues and percent of decline in total ton miles revenue-freight divided by two. Advance notice of any such force reduction shall be given as required by the current schedule agreements of the organizations signatory hereto. Upon restoration of the Merged Company's business following any such force reduction, employees entitled to preservation of employment must be recalled in accordance with the same formula within 15 calendar days.

(g) Notwithstanding other provisions of this Agreement, the Merged Company shall have the right to make force reductions under emergency conditions such as flood, snowstorm, hurricane, earthquake, fire or strike, provided that operations are suspended in whole or in part and provided further that because of such emergencies the work which would be performed by the incumbents of the posi-

tions to be abolished or the work which would be performed by the employees involved in the force reductions no longer exists or cannot be performed. When forces have been so reduced and thereafter as operations are restored upon termination of the emergency, employees entitled to preservation of employment must be recalled. In the event the Merged Company is required to make force reductions because of the aforesaid emergency conditions, it is agreed that any decline in railway operating revenues and total ton miles revenue-freight resulting therefrom shall not be included in any computation of a decline in the Merged Company's business pursuant to the provisions of the preceding paragraph.

(h) None of the provisions of this Agreement are applicable to employees temporarily hired for work on non-recurring projects between the effective date hereof and the date of the consummation of the merger.

(i) Seaboard and Coast Line agree to furnish rosters (which shall be attached as Appendix B to this Agreement) of all employees entitled to preservation of employment, compensation, and fringe benefits as of the effective date of this Agreement, and also separate rosters (which shall be attached as Appendix C) of all employees on furlough or leave-of-absence, each of which rosters shall also set forth the Carrier by which the employees are employed and the labor organization party to this Agreement representing such employees. The Carrier will furnish, upon request, the additional information specified in Appendices D and E to this Agreement. Seaboard and Coast Line further agree that the said rosters are subject to revision as necessary to include any employees to be added or deleted from said rosters between the effective date of this

Agreement and the date the corporate merger is consummated.

Section 3.

(a) In consideration of the foregoing employee benefits the Merged Company shall, subject to compliance with the provisions of Appendix F attached hereto, be entitled to transfer the work of the employees protected hereunder throughout the merged or consolidated system and the labor organizations will, subject to provisions contained in the Memorandum of Understanding attached hereto as Appendix G, enter into implementing agreements providing for the transfer and use of employees and allocation or rearrangement of forces made necessary by changes for which protection is herein provided and the employees, their organizations and the Carriers will cooperate to that end. The implementing agreements to be negotiated with respect to the transfer and use of employees and allocation or rearrangement of forces shall enable the Merged Company to transfer such employees and rearrange forces without liability to furloughed employees who may be affected by such transfer. Employees who are unable to secure employment in their own craft or class may be transferred on a temporary basis to other reasonably comparable employment for which they are physically and mentally qualified which does not require a change in their place of residence, if such transfer does not infringe upon the employment rights of other employees under existing schedule agreements. Any employee so transferred on a temporary basis shall retain the option of returning to his craft or class as employment opportunities in such craft or class become available.

(b) The Merged Company will take over and assume all contracts, schedules and agreements between Seaboard, Coast Line, and the labor organizations signatory hereto concerning rates of pay, rules and working conditions and fringe benefits in effect at the time of consummation of the said merger and will be bound by the terms and provisions thereof, and such agreements will be merged into new agreements through negotiations covering all employees of the Merged Company in each craft with consolidation of seniority rosters and seniority districts for each class and craft of employees.

(c) If after the merger there remains a surplus of employees, any present employee 60 years of age or over may at the option of the Merged Company be offered in seniority order the opportunity to resign and accept a retirement allowance based upon the age of such employee as of his nearest birthday on the date such allowance is offered. The amount of such allowance shall be:

Age at Nearest Birthday	*Allowance*
64 and under	12 months' pay
65	10 months' pay
66	8 months' pay
67	6 months' pay
68 and over	4 months' pay

The acceptance of the retirement allowance shall be at the option of the employee. Acceptance shall be in writing, shall be irrevocable and shall be received by the Supervisor offering the allowance within fifteen calendar days of receipt of such offer.

An employee who elects to accept and is awarded such allowance thereupon terminates his employment relationship with the Merged Company, and the effective date of such termination shall be that date specified in the offer by the Merged Company. A minimum of fifteen calendar days' advance notice of the date of termination of employment shall be given the employee offered the retirement allowance.

The retirement allowance herein provided will be in addition to any vacation allowance to which such employee is entitled as of the date of his retirement but shall be in lieu of all other benefits and protections to which such employee may be entitled under this Agreement.

Section 4.

In event any dispute or controversy arises between Seaboard, Coast Line, or the Merged Company and any labor organization signatory to this Agreement with respect to the interpretation or application of any provisions of this Agreement, or of any implementing agreement entered into between the Merged Company and individual labor organizations which are parties hereto, pertaining to the said merger or related transactions, which cannot be settled by said Carriers and the labor organization or organizations involved within thirty days after the dispute arises, such dispute may be referred by either party to an arbitration committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to an arbitration committee, each party shall, within ten days, select a member of the arbitration committee and the members thus chosen shall, if they cannot agree on the disposition of the dispute within ten days, endeavor to select a

neutral member who shall serve as Chairman, in which event the compensation and expenses of the Chairman shall be borne equally by the parties to the proceeding. All other expenses shall be borne by the party incurring them. Should the members designated by the parties be unable to agree upon the appointment of the neutral member within ten days, either party may request the National Mediation Board to appoint the neutral member, whose compensation and expenses shall then be paid in accordance with existing law. If any party fails to select its member of the arbitration committee within the prescribed time limit, the representative of such party signatory to this Agreement or his designated representative shall be deemed to be the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. The decision of the majority of the arbitration committee shall be rendered within thirty days after selection of the committee, unless the parties mutually agree to a further extension and shall be final and binding, except that in any case in which there is an unequal number of carrier and organization members on the arbitration committee, the decision of the neutral member shall be final and binding.

Section 5.

In the event merger or control of other carriers not now involved in the aforesaid merger proceedings shall be ordered by the Commission, this Agreement shall be subject to amendment by the parties so as to provide the employee benefits set forth in Sections 1 through 4 hereof to the employees of any such carrier controlled by or merged into the Merged Company.

Section 6.

Except as specifically provided herein, this Agreement supersedes the employee protective conditions prescribed by the Interstate Commerce Commission in Finance Docket 21215 with respect to the merger of the Seaboard and the Coast Line and supersedes the application of the Washington Job Protection Agreement, except that a Seaboard or Coast Line employee not entitled to preservation of employment under this Agreement and affected by the merger who ordinarily would be provided protection under the Washington Job Protection Agreement will be covered by the Washington Job Protection Agreement.

Section 7.

(a) The foregoing represents an agreed settlement of protection of the interests of the employees of the Seaboard and Coast Line in the said merger. Said agreed settlement of protective benefits is made on behalf of said employees by their authorized and recognized bargaining representatives signatory hereto pursuant to Section 5(2)(f) of the Interstate Commerce Act and applicable provisions of the Railway Labor Act, as amended, and shall become applicable only in the event of the proposed merger and consummation thereof. It shall be considered and construed as a separate agreement between the Seaboard, Coast Line and each of the labor organizations signatory hereto.

(b) In the event the Commission's approval of the merger of the Seaboard and the Coast Line is before a court on appeal at the time this Agreement is executed, the Railway Labor Executives' Association will inform such court that any differences as to employee protection

between the Carriers and the employees represented by the Railway Labor Executives' Association have been resolved.

Section 8.

It is understood and agreed that the provisions of this Agreement shall be for the benefit only of the employees of the Seaboard and Coast Line represented by the labor organizations parties hereto.

Section 9.

The effective date of this Agreement shall be August 1, 1966.

APPENDIX A

SUMMARY OF APPENDICES

*Appendix B—Rosters of all employees entitled to preservation of employment, compensation and fringe benefits.

*Appendix C—Rosters of all employees on furlough or leave-of-absence, setting forth the Carrier by which the employees are employed and the labor organization representing such employees.

*Appendix D—Memorandum of Understanding regarding employment information to be furnished upon request and computations respecting compensation due non-operating employees under this agreement.

*Appendix E—Memorandum of Understanding regarding employment information to be furnished upon request and computations respecting compensation due operating employees under this agreement.

Appendix F—Memorandum of Understanding regarding notices of changes under this agreement.

Appendix G—Memorandum of Understanding regarding moving expenses and lump sum separation allowances.

*Appendix H—Memorandum of Understanding regarding effect of this agreement on negotiation of national agreements.

*Appendix I—Memorandum of Understanding regarding supervisory, excepted personnel, and union organization representatives.

Appendix J—Letter of Intent.

* * * * *

*Omitted in this printing.

APPENDIX F

MEMORANDUM OF UNDERSTANDING

RE

NOTICES OF CHANGES UNDER THIS AGREEMENT

This Memorandum of Understanding is attached to and made a part of the Agreement for Protection of Employees in Event of Merger of Seaboard and Coast Line Railroads, effective August 1, 1966, hereinafter called the Agreement.

The Carriers shall give at least ninety (90) days written notice of intended changes contemplated because of the merger of the Seaboard and Coast Line by posting a notice on bulletin boards convenient to interested employees of each carrier or of the Merged Company and by sending registered or certified mail notice to the General Chairmen representing the interested employees. Such notice shall contain a full and adequate statement of the proposed changes, including an estimate of the number of employees of each class that will be affected by such intended changes. The date and place of a conference between carrier and employee representatives for the purpose of reaching agreements with respect to the application thereto of the terms and conditions of the Agreement to which this Appendix is a part, shall be agreed upon within ten (10) days after the receipt of said notice, and conferences shall commence within thirty (30) days from date of such notice. In event of failure to reach an agreement within sixty (60) days from commencement of such conferences, the dispute

may be submitted by either party for a final decision in accordance with Section 4 of the Agreement to which this Appendix is a part. The issues submitted for determination shall not include any question as to the right of the carrier to make operational changes but shall be confined to the manner of implementing the contemplated operational changes with respect to the transfer and use of employees and the allocation or rearrangement of forces made necessary by the contemplated change.

APPENDIX G

MEMORANDUM OF UNDERSTANDING RE MOVING EXPENSES AND LUMP SUM SEPARATION ALLOWANCES

This Memorandum of Understanding is attached to and made a part of the Agreement for Protection of Employees in Event of Merger of Seaboard and Coast Line Railroads, effective August 1, 1966, hereinafter called the Agreement.

In case of any transfers or rearrangement of forces for which an implementing agreement has been made, any employee who is required by the Merged Company pursuant to said implementing agreement to transfer to a new point of employment requiring him to move his residence shall be entitled to the benefits provided in Sections 10 and 11 of the Washington Job Protection Agreement, notwithstanding anything to the contrary contained in said sections, and in addition to such benefits shall receive a transfer allowance of $400.00 and five working days instead of the "two working days" provided by Section 10(a) of said Washington Agreement.

Such employee with 15 years of service or more may elect to resign in lieu of making the required transfer as aforesaid, and his resignation shall be effective as of the date the transfer would have been made. He shall be given (in lieu of all other benefits and protections to which he may have been entitled under the Agreement) a lump sum separation allowance which shall be computed in accordance

with the schedule set forth in Section 9 of the Washington Job Protection Agreement.

This Memorandum of Understanding is applicable to the Seaboard and Coast Line employees represented by the organizations signatory to the Agreement of which it is a part and supersedes all existing agreements which may be in conflict herewith.

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APPENDIX I

MEMORANDUM OF UNDERSTANDING
RE
SUPERVISORY, EXCEPTED PERSONNEL AND UNION ORGANIZATION REPRESENTATIVES

This Memorandum of Understanding is attached to and made a part of the Agreement for Protection of Employees in Event of Merger of Seaboard and Coast Line Railroads, effective August 1, 1966, hereinafter called the Agreement.

If, subsequent to the effective date of the Agreement, officials, supervisory or fully excepted personnel or union organization representatives are forced to exercise seniority rights in a craft or class of employees protected under said Agreement, then, during the period such seniority is exercised, such officials, supervisory or fully excepted personnel or union organization representatives shall be entitled to the same protection afforded by the said Agreement to employees in the craft or class in which such seniority is exercised, and no employee subject to said Agreement shall be deprived of employment or adversely affected with respect to compensation, rules, working conditions, fringe benefits, or rights and privileges pertaining thereto, by the return of the official, supervisory, or fully excepted employee or union organization representative to work under the schedule agreement.

APPENDIX J

LETTER OF INTENT

This Letter of Intent is attached to and made a part of the Agreement for Protection of Employees in Event of Merger of Seaboard and Coast Line Railroads, effective August 1, 1966.

Employees who are unable to secure employment in their own craft or class and who are offered transfer to other reasonably comparable employment as provided for in Section 3(a) and who decline to move their place of residence will have the compensation due them as prescribed in Appendices D and E reduced to the extent of all earnings from other employment.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 638

FLORIDA EAST COAST RAILWAY CO., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

No. 639

CITY OF TAMPA, FLORIDA, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

No. 641

SOUTHERN RAILWAY SYSTEM, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA JACKSONVILLE DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Interstate Commerce Commission moves that the judgment of the district court be affirmed.[1]

STATEMENT

This is the second time that this case has been before this Court.

The basic issue is the validity of the Interstate Commerce Commission's approval, under section 5 of the Interstate Commerce Act, of the merger of the Seaboard Air Line Railroad Company and the Atlantic Coast Line Railroad Company, subject to employee protective conditions and traffic conditions for the protection of competing railroads. The lower court initially held (242 F. Supp. 14) that the Commission's decision was fatally defective because of the failure to make findings as to "whether or not section 7 of the Clayton Act would be violated by the proposed merger" (Fla. J.S. 62a), with specific reference to the criteria of "product market and the geographic locus of competition" as developed in an-

[1] Four separate Jurisdictional Statements have been filed in this case; arguments presented in Nos. 638, 639, and 641 will be answered in this Motion to Affirm. The fourth, No. 640, *Railway Labor Executives Assn., et al.* v. *United States*, involves only the issue of the validity of the labor-protective conditions imposed by the Commission. An extension of time has been obtained for filing Motions to Affirm in No. 640, until November 14, 1966. For convenience of reference, "Fla. J.S." will be used to refer to the Jurisdictional Statement of the Florida East Coast Railway; "So. J.S." refers to that of the Southern Railway System; and "City J.S." refers to that of the City of Tampa.

titrust cases (Fla. J.S. 64a). That decision was reversed by this Court, in a *per curiam* opinion (382 U.S. 154), on the ground that "the District Court erred in its interpretation of the directions this Court set forth in *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), and *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173 (1959)." (382 U.S. at 156).

The standards to be applied were reiterated by this Court (382 U.S. at 156):

> "Although § 5(11) does not authorize the Commission to 'ignore' the antitrust laws, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80, there can be 'little doubt that the Commission is not to measure proposals for [acquisitions] by the standards of the antitrust laws.' 321 U.S. at 85-86. The problem is one of accommodation of § 5(2) and the antitrust legislation. The Commission remains obligated to 'estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the overall transportation policy.' 321 U.S., at 87."

This Court accordingly ordered the case remanded to the district court "for a full review of the administrative order and findings pursuant to the standards enunciated by this Court." (382 U.S. at 157).

Upon remand the district court, after an exhaustive consideration of the arguments of all of the vari-

ous plaintiffs, sustained the Commission's decision. In regard to the major issue—whether approval of the merger should be denied because of its anticompetitive consequences—the lower court found that "the ICC has clearly realized the danger zones in this merger and after analyzing the problem has chosen what it concludes to be more important public benefits" (Fla. J.S. 38a). The Court noted that the Commission "has focused on that phase of the transportation problem President Kennedy emphasized in his transportation message to Congress—*inter*modal competition", (Fla. J.S. 40a), and that it "reasoned that to maintain healthy railroads in the long run, it must foster competition at that level where it will have its most decisive effect" (Fla. J.S. 40a-41a). The Commission's determination that "the greatest good came from increasing competition in the Southeast as opposed to maintaining it in but a part of Florida" was deemed by the lower court to be a reasonable accommodation of the antitrust laws and the Interstate Commerce Act, as required by the prior decisions of this Court.

The lower court further upheld the traffic conditions imposed by the Commission as a product of "careful study" tailored "to fit [the Commission's] expert prediction of the future" (Fla. J.S. 43a), and found that the employee protective conditions "adequately protect the rights of employees in this situation" (Fla. J.S. 49a). In regard to the other contentions of the various plaintiffs, the lower court found that "the ICC explained its reasoning and supported

its application of that reasoning by substantial evidence." (Fla. J.S. 50a).

ARGUMENT

These appeals present no substantial legal question warranting plenary consideration by this Court. *Brotherhood of Maintenance of Way Employees* v. *United States*, 221 F. Supp. 19 (E.D. Mich. 1963), affirmed *per curiam* 375 U.S. 216. In its prior opinion in this case, this Court reaffirmed the standards by which the Commission is to determine whether, and subject to what conditions, a proposed merger is "consistent with the public interest." (382 U.S. at 156-57). The district court, after a thorough canvass of the voluminous record made before the Commission and a careful review of the Commission's report and order, has unanimously concluded that those standards were properly applied by the Commission herein. Since the evaluation of a merger in light of the statutory standards is peculiarly for "the wisdom and experience of [the] Commission, not of the courts" (*Minneapolis & St. L. R. Co.* v. *United States*, *supra*, 361 U.S. at 188; *McLean Trucking Co.* v. *United States*, *supra*, 321 U.S. at 87, and cases cited therein), there is no occasion for further hearing before this Court.

This Court has repeatedly recognized the special Congressional policy as to railroad structures and unifications. "The congressional purpose in the sweeping revision of Section 5 of the Interstate Commerce Act in 1940, enacting Section 5(2)(a) in its

present form, was to facilitate merger and consolidation in the national transportation system. * * * The very language * * * expresses clearly the desire of the Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification." *County of Marin* v. *United States*, 356 U.S. 412, 418-419 (1958).[2] The Commission accordingly is authorized to approve a proposed merger if it finds that the merger, subject to such conditions as it may impose, "will be consistent with the public interest," and by Section 5(11) the participants in such merger "shall be and they are hereby relieved from the operation of the antitrust laws."

Appellants have repeatedly attempted to convert this proceeding into an antitrust suit, ignoring the special Congressional policy as to rail unifications. The lower Court noted that (Fla. J.S. 5a) "at some point the orderly administrative process envisioned by Congress has been derailed. All too much time has been consumed in showing a violation of the antitrust laws and too little time devoted to assessing the 'public interest' as expressed in the Interstate Commerce Act." As this Court reiterated in its prior opinion in the instant case (Fla. J.S. 53a), it

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[2] There has been no relaxation of this Congressional purpose. As recently as 1962, with full knowledge of the instant and other major rail unification proposals pending before the Commission, the Congress refused to defer them even temporarily. See Hearings on S. 3097 before a Subcommittee of the Senate Committee on the Judiciary, 87th Cong., 2d Sess. (1962).

"matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria [of § 5(2)] that such a merger would be 'consistent with the public interest'."

Appellants have largely ignored one of the basic elements of the concept of the "public interest"—the results of the proposed merger in terms of service and benefits of the public. In addition to estimated savings of $20 million annually, the advantages to the public from the Seaboard-Coast Line merger were clearly established. For example, the Commission found (320 I.C.C. 160): "In the area of improved service, it can be anticipated that benefits will be derived from (1) more flexible schedules and more direct routes; (2) the elimination of interchanges and delays in transit; and (3) the simplification of transit arrangements and greater flexibility in arranging stopoff points. Reduction in shipping costs can be anticipated from the elimination of wasteful and unneeded transport facilities, the substitution of single-line rates on certain commodities, and the elimination of certain switching charges. A more adequate car supply, the availability of more specialized equipment, and more efficient utilization of equipment should result." The Commission further pointed to the fact that "the merged company will make a significant contribution to the economic and industrial development of the Southeastern States through the promotion of new industrial sites,

improvements in port terminal facilities, and in the stabilization of employment which will flow from greater financial stability of the merged company" (320 I.C.C. at 160-61). These are virtually the same types of benefits that the Commission found to warrant approval of the merger involved in *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 88, and relate to factors which affect the practical needs of the shippers and communities served by the parties to the merger.

The "public interest" standard does, of course, include a consideration of the competitive consequences of the merger, as urged by appellants, but "as a factor in determining the propriety of [railroad acquisitions] the preservation of competition among carriers, although still a value, is significant chiefly as it aids the attainment of the objectives of the national transportation policy." *Minneapolis & St. L. R. Co.* v. *United States*, *supra*, 361 U.S. at 187. Thus, the undisputed fact that the merger of the Seaboard and the Coast Line will result in an elimination of the competition heretofore existing between them in the Southeast, and in a rail monopoly in parts of Florida, is important only as an element of evaluation of "the effect of the merger on competitors and on the general competitive situation in the industry" (*McLean Trucking Co.* v. *United States*, *supra*, 321 U.S. at 87). That evaluation was made by the Commission, and its evaluation is no less meaningful because made in terms of the practical transportation situation involved instead of in the antitrust vocabulary preferred by appellants.

In line with their basic antitrust approach, appellants have further attempted to isolate intramodal rail competition from the general competitive situation in the transportation industry, treating it as a separate submarket in their analyses. But this ignores the simple economic fact that the virtual monopoly on intercity traffic once possessed by the railroads has long since disappeared, so that a meaningful appraisal of the competitive consequences of the merger can only be made in the context of "the sum of all of the competitive transportation facilities that will remain available in this broad area." (320 I.C.C. at 166). Even in the transportation of bulk commodities, generally regarded as "normally handled by rail" (320 I.C.C. at 151), motor and water competition has now manifested itself in the most meaningful way—compelling the railroads to reduce their rates to retain the traffic (320 I.C.C. at 153).

A practical, realistic evaluation of the competitive effects of the merger was made by the Commission. In the Southeast as a whole, the Commission found that the "overall reduction in rail competition will be relatively moderate." (320 I.C.C. at 166). In addition to the increasingly strong competition from other modes of transportation, such as the truck lines, water carriers, and pipelines, competition from other railroads will continue to exist at every major city in the area except Tampa (*id.* at 164).

In tacit recognition of the correctness of the Commission's appraisal of the competitive situation in the Southeast as a whole, appellants have concentrated their attack on the situation in Florida—an area

recognized by the Commission to be unique. The Commission observed (320 I.C.C. at 163) that in Florida "the merged company would have approximately 81 percent of the railway mileage in the State," and that "there is no question that there will be a significant reduction in rail competition in Florida." (320 I.C.C. at 166). The Commission took into account the fact that in the central and western portions of the State its approval of the merger would result in a rail monopoly. "The situation at Tampa and in the central and western portions of Florida is unique in that those areas are served by no other railroad except Seaboard and Coast Line." (320 I.C.C. at 164). "The rail monopoly that would result from the merger in portions of Florida" was specifically noted, and its "effects upon communities or the shipping public" appraised (320 I.C.C. at 165).

Appellants' attack upon the adequacy of the Commission's consideration of the competitive effects of the merger is, in reality, simply a continuation of their efforts to compel the Commission to utilize the "product and market" analysis of antitrust cases. Thus Southern alleges a "need to use quantitative terms in 'estimating the scope' of the curtailment of competition", and a requirement that the Commission "make some measurement—to say 'how much'" competition would be curtailed (So. J.S. 30-31). The City of Tampa goes even further, urging that the Commission be required to "circumscribe the geographic areas and sub-areas wherein the proposed

merger will affect competition"; to "delineate (a) the modes of transport competing therein and (b) the passengers and various commodities important therein and (c) for which commodities or types of commodity each mode successfully competes"; and, on the basis of this type of market and product analysis "articulate its estimate of the effects on 'competition'." (City J.S. 13-14). This is precisely the type of requirement which was imposed by the lower court in its initial opinion in this case—which was summarily reversed by this Court.

Contrary to appellants' assertions (Fla. J.S. 16-17, So. J.S. 28-38, City J.S. 14-16), the Commission's analysis of the competitive situation in Florida made full use of its specialized knowledge of railroad and transportation conditions and practices, as well as economic principles and antitrust objectives. The Commission evaluated the extent to which the Seaboard and Coast Line had actively competed in the past, noting that while the lines of the two railroads are generally in the same area, at only 38 out of 168 points in Florida do both actively solicit traffic through agency stations. "Thus the number of Florida points at which there has been no competition is about four times as great as the number of Florida points at which Seaboard and Coast Line have heretofore competed." (320 I.C.C. at 165). "Seaboard and Coast Line heretofore have had what might be described as an imperfect monopoly" in parts of Florida, "from which there have been no appreciable adverse competitive effects upon communities or the shipping public." (320 I.C.C. at 164-165).

As a matter of practical transportation knowledge, it must also be recognized that full *laissez faire* competition has long since disappeared in the railroad industry. Congress has specifically made it a matter of public policy that railroads need not compete in the pricing of their services,[3] and the conference method of rate-making is widespread. The pervasive regulatory power of the Commission provides a further "effective safeguard against the evils attending monopoly" (*McLean Trucking Co.* v. *United States*, *supra*, 321 U.S. at 85). These are matters either ignored or discounted by appellants—despite the fact that appellant Florida East Coast possesses a similar local rail monopoly in much of eastern Florida.

Furthermore, appellant's entire discussion of the resulting rail monopoly "in" central and western Florida is misleading, since as a practical matter most rail traffic consists of long-haul movements *between* Florida and other parts of the Nation. Thus the competitive effects of the Seaboard-Coast Line merger on Florida shippers and communities can be evaluated only in the context of the alternative rail routes to and from other areas. It was this aspect of the competitive situation with which the Commission was concerned when it imposed routing and gateway conditions which not only preserve existing rail competition on shipments moving to and from Florida, but will actually enhance the competitive position of such railroads as Southern.

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[3] Section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b.

One of the major conditions imposed by the Commission would open the Jacksonville gateway to the Southern. Southern is presently precluded, by the refusal of Seaboard and Coast Line to participate in through routes and joint rates with it, from participating in much of the Florida traffic originated at Seaboard and Coast Line points. The Commission, as a condition to its approval of the merger, has required that the Jacksonville gateway be opened to Southern and its affiliates "as to all traffic moving through Jacksonville at rates no higher than those available through other gateways." (320 I.C.C. at 182). The Commission further awarded the Central of Georgia, a Southern subsidiary, trackage rights which will also provide it with a Jacksonville gateway. These conditions will considerably enhance Southern's ability to compete for traffic moving between Florida and northern points, and thus "will result in an increase rather than decrease in intramodal rail competition." (320 I.C.C. at 188).

Ignoring the fact that many of the traffic conditions requested by it were actually imposed by the Commission (320 I.C.C. at 180-188), Southern is here complaining of the Commission's conclusion that two of its requested conditions were unnecessary—a condition which would have required the Seaboard-Coast Line to transfer to Southern a direct line from Jacksonville to Tampa (the very line that Seaboard and Coast Line plan to use in their own Tampa service (Tr. 3575-76)) and a condition which would require the merged company to divest itself of the Coast Line's long-standing stock interest in the Louisville and Nashville Railroad.

Southern's major contention is that the Commission's denial of the requested transfer to it of a line into Tampa was predicated on an erroneous "standard based on the private interests of the railroads involved and disregarding the public interest" (So. J.S. 41). Such contention, however, completely ignores the basic reason given by the Commission for its denial of the requested condition—that the transfer of the line "would, to a large extent, require the dismemberment of the merged company's lines, interfere with the merged company's planned economies, and in general frustrate the overall objectives of the merger, all to the detriment of the public interest." The transfer would be "primarily for the benefit of [Southern]" (320 I.C.C. at 209-10), and "would deprive the merged company of substantial revenues" (320 I.C.C. at 187). Thus the Commission properly found that the requested transfer would not be justified.

Southern's further request that the merged company be required to divest itself of Coast Line's interest in the L & N was deemed by the Commission "not necessary in the public interest" (320 I.C.C. at 189). Although Coast Line has owned a substantial stock interest in L & N since 1902, the L & N has always "operated under separate management unhampered by any influence of Coast Line" (320 I.C.C. at 188), and will continue to do so after the merger.[4] The

[4] Although Southern alleges (So. J.S. 9, 43-46) that there has been and would be significant "favoritism" between the companies, this factual question was decided to the contrary by the Commission, and its finding sustained by the lower court.

L & N operates outside the competitive area of Seaboard and Coast Line, so that "competition between the Louisville and Nashville and its competitors is more likely to remain free from the influence of the merged company." (320 I.C.C. at 189). Of even greater significance is the fact (which Southern does not mention) that, by virtue of the extraordinary traffic conditions here imposed by the Commission, Southern will now be able to perform over its own lines virtually all service that the merged company could perform in connection with the L & N (320 I.C.C. at 189, 208-209), so that the anticompetitive results alleged by Southern (So. J.S. 45-46) are largely illusory. In this circumstance, the Commission properly found divestiture to be unnecessary.[5]

Finally, Southern and the City of Tampa allege (So. J.S. 38-40, City J.S. 16-17) that the record made in the Commission proceeding was inadequate on the issue of the competitive effects of the merger. This is simply another link in appellants' efforts to force this case into the mold of an antitrust proceeding. Thus the City of Tampa[6] contends that the rec-

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[5] Southern's assertion (So. J.S. 46, at fn. 30) that "there has been no court review of this issue" is unwarranted. The lower court specifically stated (Fla. J.S. 50a) that it had considered "all other arguments" raised by the parties, and concluded that the Commission "explained its reasoning and supported its application of that reasoning by substantial evidence."

[6] The City of Tampa, moreover, initially adopted a resolution *supporting* the Seaboard-Coast Line merger. Only after the initial judgment of the district court had been vacated by this Court and the proceeding remanded to the district

ord "does not even contain the data from which it [the Commission] could validly deduce all the relevant geographic and product markets and submarkets" (City J.S. 16). This type of product and market analysis has already been held by this Court to be inappropriate in a rail merger proceeding, and the fact that the record does not supply precise data as to such matters simply reflects the fact that the record was developed in the context of the "public interest" standards of the Interstate Commerce Act, rather than the standards of the antitrust laws. Furthermore, as the lower court noted (Fla. J.S. 38a), appellants had full opportunity to produce such evidence during the Commission proceeding; having failed to do so, they are in a poor position to complain now that the record is inadequate to support their contentions. See *Brotherhood of Maintenance of Way Employees* v. *United States*, *supra*, 221 F. Supp at 28.

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court for full review of the Commission's decision did the City appear in opposition to the proposed merger. Its change of heart was apparently motivated by the Coast Line's proposal to construct a line of railroad to serve a new central Florida port which would be competitive with Tampa—a matter which has nothing whatsoever to do with the proposed merger. See *Florida East Coast Ry.* v. *United States*, No. 715, O.T. 1966.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel,

FRITZ R. KAHN,
Associate General Counsel,

BETTY JO CHRISTIAN,
Attorney,
Interstate Commerce Commission

November 1966

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 237360 365

SUPREME COURT, U. S.
FILED
NOV 14 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 640

RAILWAY LABOR EXECUTIVES' ASSOCIATION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Appellants,

—v.—

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO DISMISS OF APPELLEES SEABOARD AIR LINE RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, THE ATLANTIC COAST LINE COMPANY, AND MERCANTILE-SAFE DEPOSIT AND TRUST COMPANY

PAUL A. PORTER
DENNIS G. LYONS
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Appellees Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, The Atlantic Coast Line Company, and Mercantile-Safe Deposit and Trust Company

Of Counsel:

HAROLD J. GALLAGHER
WALTER H. BROWN, JR.
WILLKIE FARR GALLAGHER WALTON & FITZ GIBBON
New York, New York

RICHARD A. HOLLANDER
Richmond, Virginia

PRIME F. OSBORN, III
JOHN W. WELDON
PHIL C. BEVERLY
Jacksonville, Florida

EDWIN H. BURGESS
Baltimore, Maryland

ARNOLD & PORTER
Washington, D. C.

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Appellees Seaboard Air Line Railroad Company ("Seaboard"), Atlantic Coast Line Railroad Company ("Coast Line"), The Atlantic Coast Line Company, and Mercantile-Safe Deposit and Trust Company, pursuant to Rule 16 of the Rules of this Court, move that the appeal in No. 640 be dismissed, on the grounds that the differences between the Seaboard and Coast Line (the railroads proposing to merge) and the appellants as to employee protection have been disposed of by agreement between the appellants, on the one hand, and Seaboard and Coast Line, on the other.

The present appeal is an appeal by the Railway Labor Executives' Association ("RLEA"), with whom 23 of the standard railway labor organizations are affiliated, and the Brotherhood of Locomotive Engineers ("Engineers") (the other standard railway labor organization), from a judgment of the District Court for the Middle District of Florida entered on June 8, 1966. That judgment upheld the Interstate Commerce Commission's conditional approval of a merger between Seaboard and Coast Line. In the Commission's conditional approval, it imposed certain labor-protective conditions under Section 5(2)(f) of the Interstate Commerce Act, which requires the imposition of labor-protective conditions upon various transactions approved by the Commission. The RLEA and Engineers contested, before the District Court, the adequacy of the labor-protective conditions and their consistency with the requirements of Section 5(2)(f). By their appeal in No. 640, they sought review by this Court on appeal of the District Court's adverse decision on their contentions as to the labor-protective conditions. RLEA and Engineers, in their appeal in No. 640, however, did not raise any questions, apart from the labor-protective issues, concerning the merger.[1]

On November 3, 1966, in connection with an application for an extension of time, we advised that on that date an overall negotiated settlement had been entered into between Seaboard and Coast Line and the organizations represented by the RLEA respecting the labor-protective provisions to govern upon the consummation of the merger. (*Cf.* final sentence, Section 5(2)(f)). We then advised that

[1] Certain other appellants, in Nos. 638, 639 and 641, have raised other questions concerning the merger. We filed, on November 7, 1966, a Motion to Affirm with respect to the appeals in Nos. 638, 639 and 641.

there was a substantial expectation that a similar settlement would be reached with the Engineers within a few days.

Such a settlement has now been reached in principle between Seaboard and Coast Line, on the one hand, and Engineers, on the other, and we have been advised on Engineers' behalf that they now view the differences between them and the Seaboard and Coast Line as having been disposed of in the light of these circumstances. We have also been advised on behalf of RLEA and Engineers that they will interpose no objection to the granting of a motion to dismiss their appeal, made by us, on the grounds that the parties by mutual agreement have disposed of their differences as to employee protection.

Accordingly, since the Coast Line and Seaboard and the appellants have disposed of their differences as to employee protection by agreement, we respectfully submit that it would be appropriate for the Court to enter an order dismissing the appeal in No. 640.

CONCLUSION

For the reasons stated, the appeal in No. 640 should be dismissed.

Respectfully submitted,

PAUL A. PORTER
DENNIS G. LYONS
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Appellees Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, The Atlantic Coast Line Company, and Mercantile-Safe Deposit and Trust Company

Of Counsel:

HAROLD J. GALLAGHER
WALTER H. BROWN, JR.
WILLKIE FARR GALLAGHER WALTON & FITZ GIBBON
New York, New York

RICHARD A. HOLLANDER
Richmond, Virginia

PRIME F. OSBORN, III
JOHN W. WELDON
PHIL C. BEVERLY
Jacksonville, Florida

EDWIN H. BURGESS
Baltimore, Maryland

ARNOLD & PORTER
Washington, D. C.

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Office-Supreme Court, U.
FILED
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F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Nos. 638, 639 and 641

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant,*

v.

UNITED STATES OF AMERICA, *et al.*, *Appellees.*

CITY OF TAMPA, FLORIDA, *Appellant,*

v.

UNITED STATES OF AMERICA, *et al.*, *Appellees.*

SOUTHERN RAILWAY SYSTEM, *Appellant,*

v.

UNITED STATES OF AMERICA, *et al.*, *Appellees.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO AFFIRM OF APPELLEES SEABOARD AIR LINE RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, THE ATLANTIC COAST LINE COMPANY, AND MERCANTILE-SAFE DEPOSIT AND TRUST COMPANY

PAUL A. PORTER
DENNIS G. LYONS
1229 Nineteenth Street, N. W.
Washington, D. C. 20036
Attorneys for Appellees Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, The Atlantic Coast Line Company, and Mercantile-Safe Deposit and Trust Company

Of Counsel:

HAROLD J. GALLAGHER
WALTER H. BROWN, JR.
WILLKIE FARR GALLAGHER WALTON & FITZ GIBBON
New York, New York

RICHARD A. HOLLANDER,
Richmond, Virginia

PRIME F. OSBORN, III
JOHN W. WELDON
PHIL C. BEVERLY
Jacksonville, Florida

EDWIN H. BURGESS
Baltimore, Maryland

ARNOLD & PORTER
Washington, D. C.

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Appellees Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, The Atlantic Coast Line Company, and Mercantile-Safe Deposit and Trust Company, pursuant to Rule 16 of the Rules of this Court, move that the judgment of the District Court be affirmed with respect to the questions raised by the appeals in Nos. 638, 639 and 641, on the ground that the questions raised by the appellants are so clearly lacking in substance as not to warrant further briefing and oral argument.[1]

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[1] Hereinafter, short name forms will sometimes be used as follows: The merger applicants will be called "Seaboard" and "Coast Line";

QUESTION PRESENTED

Whether the Interstate Commerce Commission acted within its statutory powers under § 5(2) of the Interstate Commerce Act in finding that the merger of Seaboard and Coast Line, subject to the conditions prescribed, would be consistent with the public interest.

STATEMENT

Seaboard and Coast Line are interstate railroads. Each operates only in the six states of Virginia, North Carolina, South Carolina, Georgia, Alabama and Florida.

In May, 1960, the directors of Seaboard and Coast Line agreed to a Plan of Merger for the merger of Coast Line into Seaboard. The Plan was thereafter overwhelmingly approved by the stockholders of each company.

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the carrier to result from the merger will be called the "Merged Carrier"; the Interstate Commerce Commission will be called the "Commission"; the Southern Railway System, consisting of the Southern Railway Company and its subsidiaries and affiliates, will be called the "Southern"; the Florida East Coast Railway Company will be called the "FEC"; the City of Tampa, Florida, will be called "Tampa."

References such as "Southern 10" are to pages of the indicated jurisdictional statement filed by the three appellants, FEC, Southern and Tampa. References to "Tr." and to "Ex." are to the Reporter's Transcript and the Exhibits forming a part of the record before the Commission. References to "Ex. Rep." are to the Hearing Examiner's Report, on file with this Court as Appendix II to our Jurisdictional Statement on the prior appeal of this case, No. 425, O.T. 1965. Page references are to the indicated folio pages ("fol.") of the Report, *not* to the printed page numbers in that Appendix. We have filed nine additional copies of the Appendix containing the Examiner's Report for the convenience of the Court. Nine printed copies of the Commission's Report, paginated as in 320 I.C.C., are also being filed.

Proceedings before the Commission.—Seaboard and Coast Line jointly applied in July, 1960, for authority to merge pursuant to § 5(2) of the Interstate Commerce Act. Eighty-six parties who filed 166 pleadings participated in the extensive ensuing proceedings before the Commission. Hearings were held before an Examiner in seven cities in the Southeast on 35 hearing days between November, 1960, and July, 1961. The record of those hearings contains 5,729 pages of reporter's transcript, 101 prepared testimony statements containing 1,221 pages, and 271 documentary exhibits.

More than a year after the close of the hearings, and after receiving briefs, the Examiner, on August 24, 1962, issued an extensive report and recommended order approving the merger upon certain prescribed conditions. Exceptions and replies were filed with the Commission by various of the parties.

On May 7 and 8, 1963, the case was argued orally before the full Commission. On December 13, 1963, the Commission issued and served an exhaustive report,[2] dated December 2, 1963, setting forth in detail the Commission's reasons for approving the proposed merger, subject to certain specified conditions.

The Commission's report, among the other public interest factors, extensively analyzed the competitive factors inherent in the proposed merger, recognizing at the outset of its discussion the obvious fact that: "The proposed merger would result in the elimination of present competition between Seaboard and Coast Line in a 6-state area." (320

[2] In printed form the Commission's report itself covers 148 pages, and the report of the Examiner, which the Commission's Order incorporates by reference (App. B, p. 6a, *infra*), in the form in which we printed it in the Appendix on the prior appeal of this case, covers 268 pages, including appendices.

I.C.C., at 163) The Commission proceeded to a full analysis of the "intramodal" (rail) competition as it would be affected by the merger. First, it analyzed the quantum of the total competitive tonnage of the two roads and the portion of that tonnage that would remain subject to competition from other rail carriers after the merger.[3] The Commission observed that, in terms of points where the merging roads had agents, "there would be only 17 communities outside of Florida which would be without competitive rail service after the merger, and these communities have an average population of approximately 6,500 each." (320 I.C.C., at 164)

The Commission noted that: "Though the merged company will be the biggest railroad in the area, whether measured in terms of revenues, or assets or mileage, it will encounter vigorous competition from other rail carriers. The record here shows that rail competition will exist at every major city with a population in excess of 200,000 except at Tampa." (320 I.C.C., at 164) The Commission further noted that the situation at Tampa and in central and western Florida generally was unique since those areas were served by no other railroads besides the merger applicants. However, within this framework of local, origination-point competition, the Commission analyzed the peculiarities of the Florida situation in that in terms of points at which Seaboard and Coast Line had maintained agents "the number of Florida points at which there has been no competition [between the two carriers] is about 4 times as great as the number of Florida points at which

[3] The Commission noted that 33.4% of the total tonnage of Seaboard and Coast Line was competitive between them. Of this competitive portion of the two railroads' tonnage, over 65% would remain competitive with other railroads after the merger. (320 I.C.C., at 211)

Seaboard and Coast Line have heretofore competed." (320 I.C.C., at 165)

Observing that: "The impact of this merger, both good and bad, will be felt throughout the southern region and in evaluating its competitive advantages and disadvantages, we must consider the rail service provided by all rail carriers and, in fact, the sum of all of the competitive transportation facilities that will remain available in this broad area" (320 I.C.C., at 166), the Commission analyzed the competitive effects of the merger in terms of both intramodal competition and in terms of competition with transportation provided by competing forms of carriage.

The Commission considered the growth of competition due to government subsidies to highway, water, and air carriers; the constant decrease in the proportion of intercity traffic handled by rail and the corresponding increase of traffic by other modes; the increase in truck registrations; the increase in air passenger travel; the increase in tonnage handled by the ports in the territory of Coast Line and Seaboard; the increase in products carried through pipelines; the respective motor tonnages and rail tonnages at 21 representative points in the Southeast; the particular inroads made by trucks in the movement of perishable commodities; the increase in waterborne traffic at the port of Tampa, largely competitive for the heavy, bulk-loading commodities with rail carriage, and the decline of rail revenue on traffic at Tampa. (320 I.C.C., at 150-53)

Against this backdrop, the Commission noted the declining income of Seaboard and of Coast Line, and the problems associated with their increased operating costs and the problem of their excess "plant" capacity. The Commission reviewed the economies—so relevant to modern, effi-

cient service—to flow from the merger. Meticulously analyzing and to a considerable extent reducing the estimates of economies made by the merger applicants, it nonetheless concluded "that the total savings will be substantial and will approximate our estimate of at least $20 million a year." (320 I.C.C., at 159) The Commission concluded that: "In the light of these and other factors, particularly the accelerated growth of external competition, it is evident that, following the merger, there will be greater assurance of the ability of these railroads to provide efficient, adequate, and improved service to the public in the future." (320 I.C.C., at 153)

The Commission, recognizing that the real competition in the rail industry is "route competition" for the revenue-producing long haul, used its administrative powers to balance the competitive situation with respect to the Southern —the principal rail competitor of Seaboard and Coast Line. This was done with particular reference to the long-haul on traffic that would be originated in central and western Florida,[4] where the merger's effects on intramodal origination-point competition were obviously most pronounced. The Commission recognized that tariffs presently in effect prevent routing over Southern's lines north of Jacksonville on certain traffic to and from Florida points on Seaboard and Coast Line. (320 I.C.C., at 182) The Commission accordingly ordered the Merged Carrier to establish, in conjunction with Southern, joint rates on traffic through the Jacksonville gateway, even though this would compel the Merged Carrier to "short haul" itself and lose the beyond Jacksonville movement of this traffic. These rates

[4] Southern's operations in Florida do not extend south of Jacksonville and Palatka which are, of course, in the northeast corner of the state.

were to be no higher than the rates applicable over the lines of the Merged Carrier itself, through the Jacksonville gateway, or via any other gateway. The Commission stated that this requirement (Condition 8, App. A, pp. 2a-3a; App. C, p. 12a, *infra*) would make Southern "fully competitive with the merged company with respect to northbound traffic out of Jacksonville." (320 I.C.C., at 182) Certain other conditions were imposed to insure the ability of other rail carriers to compete effectively with the Merged Carrier, and thus to provide the public the advantages of balanced competitive rail service.[5]

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[5] Thus, in order to ensure the maintenance of balanced competition after the merger:

(a) The Merged Carrier was required to give the Central of Georgia (a Southern affiliate) trackage rights over the present line of Coast Line from Albany to Tifton, Georgia. This would give Central of Georgia and Southern a continuous route from Birmingham and Montgomery to Jacksonville, and when considered with the condition opening the Jacksonville gateway, the Commission concluded, would not only "be particularly beneficial to Southern and Central" but "also provide a significant volume of interchange trackage for [Florida] East Coast at the Jacksonville gateway." (320 I.C.C., at 183) (Condition 12; App. A, p. 4a, *infra*)

(b) The Coast Line and Seaboard each operate a line between Jacksonville and Quinlan, Florida, an industrial area which includes a large plant of the St. Regis Paper Company. St. Regis and Southern, in order to keep service at Quinlan competitive, requested that the Merged Carrier be required to sell or lease one of the two lines to Southern, and the Commission imposed this condition. (Condition 11; App. A, p. 4a, *infra*)

(c) The Merged Carrier was required by the Commission to open new routes with the Norfolk Southern Railway, an east-west carrier operating primarily in Southern Virginia and North Carolina. The Merged Carrier was ordered to open new routes and maintain joint routes with Norfolk Southern through the Wilson, N. C., Fayetteville, N. C., and Raleigh, N. C., gateways. (Condition 7; App. A, p. 2a, *infra*)

In addition, among other conditions, there were imposed on the Merged Carrier general traffic conditions ordering the maintenance of all routes and channels of trade via existing junctions and gateways; ordering preservation of neutrality in handling traffic; ordering preservation of present traffic and operating relationships with

The Commission stated that it expected "positive results to flow from consummation of this merger subject to the described conditions." The Commission stressed, "it is important to note that the conditions we have devised represent neither mere acceptance of the minimum concessions offered by the applicants nor full acquiescence in the demands of the intervening railroads, but rather are the product of our exhaustive study of the competitive situation in the Southeast. We are convinced that these routing and gateway conditions will establish two balanced competitive systems in that area and will result in an increase rather than decrease in intramodal rail competition that will contribute to the present and future economic development of this important section of the Nation." (320 I.C.C., at 188)

Balancing the factors, the Commission decided that its conditional authorization of the proposed merger would be consistent with the public interest, and, accordingly, made the finding to that effect required by § 5(2) of the Interstate Commerce Act. The Commission concluded:

> "In our determination, we are required to give consideration to the effect that the merger would have upon competitors and on the general competitive situation in the railroad industry in the light of the objectives of the national transportation policy. *McLean Truck-*

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connecting lines; imposing an obligation to handle the cars of other lines without discrimination; prohibiting interference with the right of industries to select their own routing for traffic; ordering the maintenance of existing freight train schedules, so as to preserve connections with other railroads; and allowing Southern to abandon certain trackage agreements with the Merged Carrier which might prove to be burdensome to it. (Conditions 1, 2, 3, 4, 5, 6, 9 and 10; App. A, pp. 1a-4a)

We set forth the text of the conditions imposed as Appendix A, pp. 1a-5a, *infra*, and the Order amending one of them as Appendix C, pp. 10a-12a, *infra*.

ing Co. v. *United States, supra.* We have carefully evaluated the effects of the curtailment of competition that will result from the merger, and, when considered in connection with the advantages of the merger, including improved service, safer operations, and lower costs, we are convinced that the advantages of the merger far outweigh the potential disadvantages." (320 I.C.C., at 212)

Two commissioners dissented from the order of conditional approval, essentially on the theory, later espoused by the District Court in its first opinion, that the Commission erred through its "failure to make one critical finding; viz., whether or not the proposed merger, but for section 5(11) of the Interstate Commerce Act, would run afoul of section 7 of the Clayton Act." (320 I.C.C., at 226)

On reconsideration, the Commission modified one of the routing and gateway conditions and otherwise denied reconsideration, on March 4, 1964. (See App. C, pp. 10a-12a, *infra*)

The judicial review proceedings.—On March 18, 1964, FEC filed a complaint to set aside the Commission's orders, and a temporary restraining order issued. Southern and the Railway Labor Executives' Association were granted leave to intervene as plaintiffs; the Justice Department, answering for the statutory defendant United States, aligned the United States as a plaintiff. Seaboard, Coast Line, and The Atlantic Coast Line Company and Mercantile-Safe Deposit and Trust Company[4] intervened as de-

[4] The last two companies are companies in control of Coast Line. Various issues as to their status were raised before the Commission, and pursued to some extent in the judicial review proceedings; those issues have now been abandoned by appellants. No question relating to these companies has been preserved in the Jurisdictional Statements. See FEC 3; Tampa 4-5; Southern 5-6.

fendants. On May 13, 1965, the District Court entered an opinion and judgment setting aside the orders of the Commission. (242 F. Supp. 14; FEC 54a-70a) The District Court set aside the orders because it concluded that the Commission's analysis of the competitive effects of the merger was fatally defective, since the Commission had not made certain determinations and findings. Those supposedly lacking determinations and findings were whether, by reference to the relevant product and geographic markets, the merger violated § 7 of the Clayton Act.

On appeals by the Commission and by the Seaboard and Coast Line,[7] this Court unanimously and summarily vacated the judgment of the District Court. *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154 (1965). This Court held that the District Court erred in its interpretation of the proper standards to be applied by the Commission in passing upon a rail merger proposal under § 5(2) of the Interstate Commerce Act. It emphasized that the teachings of its decisions in *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944), and *Minneapolis & St. L. R. Co.* v. *United States,* 361 U.S. 173 (1959), remained in effect. It accordingly remanded the case to the District Court to perform the normal judicial review functions.

After performing those functions, on June 8, 1966, the District Court, in a lengthy opinion (FEC 2a-50a), after an exhaustive analysis of the Commission's action, sustained the Commission's orders. The District Court concluded that

> "the ICC explained its reasoning and supported its application of that reasoning by substantial evidence.

[7] And by the Coast Line's two controlling companies.

> Since the ICC correctly applied the proper standards and thus exhibited that familiarity with the complex problems in the transportation industry which Congress anticipated the ICC would achieve from its particularized experience, we must and do sustain its order." (FEC 50a)

From that judgment, FEC, Southern and Tampa[a] have appealed to this Court.

ARGUMENT

I. THE COMMISSION CORRECTLY APPLIED THE STANDARDS TAUGHT BY THIS COURT IN PASSING ON THE MERGER. IT ESTIMATED THE SCOPE AND APPRAISED THE EFFECTS OF THE CURTAILMENT OF COMPETITION WHICH WOULD RESULT, AND CONSIDERING THIS WITH THE ADVANTAGES TO FLOW FROM THE MERGER ACTED WITHIN ITS POWERS IN FINDING THAT THE MERGER, SUBJECT TO THE CONDITIONS WHICH IT PRESCRIBED, WOULD BE CONSISTENT WITH THE PUBLIC INTEREST.

The standards by which a proposed rail unification is to be judged by the Commission under § 5(2) of the Interstate Commerce Act—and the limits within which the Commission's judgment is to be reviewed by the courts—have been laid down and reiterated by this Court:

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[a] Tampa was, after supporting the merger before the Commission, permitted to intervene in opposition to the merger before the District Court on remand.

The Railway Labor Executives' Association and the Brotherhood of Locomotive Engineers have in No. 640 appealed to this Court with respect to certain issues concerning the scope and application of the labor-protective conditions imposed by the Commission upon the merger. This Motion to Affirm does not relate to that appeal.

> "In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' . . . 'The wisdom and experience of that Commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest' . . . ." *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87-88 (1944).

In *McLean,* the Court made it plain that "in authorizing those consolidations [under § 5(2) of the Interstate Commerce Act] it [Congress] did not import the general policies of the anti-trust laws as a measure of their permissibility." *Id.,* at 85. And, more recently, in *Minneapolis & St. L. R. Co.* v. *United States,* 361 U.S. 173 (1959), this Court reiterated and entirely reaffirmed the standards governing Commission action set forth in *McLean.* It reiterated that the Commission's power under § 5 is—as that section provides—"exclusive and plenary"; that while "the preservation of competition among carriers [is] . . . still a value," it is "significant chiefly as it aids in the attainment of the objectives of the national transportation policy"; and that the Commission "is not to measure proposals for [acquisitions] by the standards of the antitrust laws." *Id.,* at 185.

Again only last Term, in the prior appeal in this case, this Court expressly reaffirmed the teachings of *McLean* and *Minneapolis. Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154 (1965). There, this Court declared that:

> "The same criteria [as set forth in *McLean* and *Minneapolis*] should be applied here to the proposed merger. It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be 'consistent with the public interest.'" *Id.*, at 156-57.

The basic thrust of FEC, Southern and Tampa in urging this Court to devote its time to a plenary hearing on further review of the voluminous record made before the Commission in this matter is essentially: First, that this is an important railroad merger case and the first of the "current wave" to be presented to this Court (Southern 19; FEC 9-10; Tampa 18); second, that it is important for this Court to fix the applicable legal standards governing the Commission's approval of rail mergers and "to decide the standards to be applied when appraising the anticompetitive effects of these proposed mergers" (Tampa 18; see Southern 20; FEC 9-10); and, finally, that because of what the appellants contend to be the importance of this merger, the "ultimate issue of public interest under the Interstate Commerce Act should be resolved by this Court." (FEC 15)

Each of these broadly-brushed contentions articulates the same fallacy—appellants' refusal to recognize that Congress vested the determination as to the issue "of public interest under the Interstate Commerce Act" in the

Commission, not in the courts. "It is not true . . . that . . . 'the courts must, in a litigated case, be the arbiters of the paramount public interest'. This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535-36 (1946). In essence, the appellants are simply seeking to retry *de novo* in this Court, as they sought unsuccessfully to retry in the District Court, the issues of the proper accommodation of the competitive factors with the ultimate public interest standard which were vested by law in the Commission to determine, and which, after full participation by appellants, the Commission did determine here.

Appellants' suggestion that it is important for this Court to settle the governing legal principles to be applied by the Commission in a railroad merger comes rather late in the day. That is what this Court did in the *McLean* case; that is what it did again by reiterating those principles in the *Minneapolis* case; and that is what it did once again last Term in this very case by unanimously and summarily vacating the earlier decision of the District Court which had departed from those principles. It is difficult to see what further elucidation of the principles three times laid down by this Court is required.

Likewise, the appellants' insistence upon the intrinsic importance of this merger and the fact that it was, when decided by the Commission, the first of a number of then-pending rail unification cases before the Commission, is irrelevant to the question whether this Court should devote its attention to a plenary review of the Commission's decision. The importance of the merger was one of the reasons why it had extraordinarily careful attention before

the Commission; it is not a reason for this Court's review in the absence of a demonstration of some respect in which the Commission acted beyond its powers or failed to perform its statutory duties as taught by the decisions of this Court.

And, in point of fact, this case is no longer—to a great extent, perhaps, due to the delays attendant upon the efforts of appellants—the "first" of any group of important rail unification cases. In a number of rail merger and control cases, Commission approval has been granted and there is no remaining opposition related to the issue of the accommodation of the competitive factor and the public interest. See *Norfolk & W. R. Co. and New York, C. & St. L. R. Co.—Merger,* 324 I.C.C. 1 (1964) (merger consummated); *Chesapeake & O. R. Co.—Control—Baltimore & O. R. Co.,* 317 I.C.C. 261 (1962), *order sustained sub nom. Brotherhood of Maintenance of Way Employees* v. *United States,* 221 F.Supp. 19 (E.D. Mich. 1963), *aff'd,* 375 U.S. 216 (1963) (transaction consummated); *Missouri Pac. R. Co.—Control—Chicago & E. I. R. Co.,* ICC Fin. Dkt. No. 21755 (1963), *order sustained sub nom. Illinois Cent. R. Co.* v. *United States,* N.D. Ill., No. 65-C-1393, August 4, 1966, *appeals docketed,* Nos. 687, 688, 689, O.T. 1966 (court review not involving competitive factor); *Pennsylvania R. Co.—Merger—New York Cent. R. Co.,* 327 I.C.C. 475 (1966), *injunction denied sub nom. Erie-Lackawanna R. Co.* v. *United States,* S.D.N.Y., 35 U.S.L.W. 2203, October 4, 1966, *review granted,* 35 U.S.L.W. 3149, October 18, 1966, Nos. 642, 680, 691, O.T. 1966 (court review not involving competitive factor). In other important merger and control cases, the Commission has disapproved the proposed transaction. See *Southern Pac. Co.—Control—Western Pac. R. Co.,* ICC Fin. Dkt. No. 21314 (1965); *Great Northern Pac. & Burlington Lines, Inc.—Merger,*

ICC Fin. Dkt. No. 21478, decided March 31, 1966. Each case is adjudicated by the Commission on its own facts, under the legal principles reiterated by this Court. Certainly, then, while the importance of this case as a Commission case might have suggested to certain of the interests now complaining of the Commission's decision to have been more attentive to the Commission's hearings than they were,[9] plenary review of it by this Court—particularly in the light of the District Court's exhaustive judicial review and this Court's prior reiteration of the governing standard—is not now important or required.

II. THE SPECIFIC ATTACKS ON THE COMMISSION'S FINDINGS ARE BASELESS.

In those few places where the appellants deign to be specific in their complaints as to the Commission's action, they essentially engage in literary criticism of the Commission's report. In form, their attacks are on the adequacy of the Commission's findings. But, indeed, it would be a rare case where appellate counsel could not conjure up scores of additional findings which the Commission could have made. The process is facilitated, of course, in a case like the present where the appellants do not recognize that there is any requirement that they request the administrative agency to make findings in specific areas before complaining in court that the agency failed to make such findings.[10] —The short answer is that, as this Court

[9] See n. 10, *infra*.

[10] The appellants are stung by the District Court's insistence that issues be raised before the Commission before being submitted to the court on judicial review. (Southern 38-40) Perhaps this view of the judicial review proceedings as a trial *de novo* was what prompted the Antitrust Division, also, to attend the administrative hearings only on five days out of 35, and, after requesting a special session of Commission hearings in Washington, D. C., for it to produce its evidence, to fail to produce any evi-

has observed, the Commission is not required to make detailed findings; it is required simply to make the basic ones "essential to the statutory validity of an order", and to disclose "in its report" "the essential basis of its judgment." *Alabama G.S.R. Co.* v. *United States*, 340 U.S. 216, 228 (1951). Indeed, of course, here the Commission's report in fact is detailed and exhaustive and plainly points out the essential basis for its judgment.

The unspoken major premise of most of the appellants' claims of the inadequacy of the Commission's findings is simply a thinly disguised harkening back to the erroneous theory which they were able to induce the District Court to accept in its first decision: That the Commission was required to make findings of the sort which would be required in an antitrust case under § 7 of the Clayton Act.—Indeed, from time to time the appellants expressly let slip out their persistence in the approach which this Court last Term unanimously rejected. Thus, Tampa declares: "The Commission did not fulfill its obligation to make adequate findings partly because the administrative hearing record it compiled does not contain the data from which it could validly deduce all the relevant geographic and product markets and submarkets. . . ." (Tampa 16) —But this will-of-the-wisp chase after each and every product and geographic market and submarket is the very approach which this Court rejected last Term.

We will reply to the specific deficiencies with which the appellants seek to charge the Commission's report.

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dence. (FEC 39a) While, to be sure, the essential statutory findings must be made, whether or no any party requests them to be made, it would be a stultification of the administrative process to say that the Commission was required to make findings on a host of diverse points when never requested to by the parties before it, simply in the light of a retrospective argument in court.

1. *The Benefits to the Public.*—The appellants contend that the Commission overstated the benefits to be derived from the merger; that it mistook private benefits to the merger applicants for benefits to the public; and that it concentrated solely on the savings to the Merged Carrier to result from the merger, and that, on the basis of such savings, any merger could be justified no matter what the effect on competition. On this basis, the appellants suggest that the Commission improperly weighted the scales against competition.[11] (FEC 10-14; Southern 10, 24-27)

But the fact of the matter is that the Commission expressly recognized that its decision was not predicated "upon the financial gains that may accrue to the stockholders of the merged company" (320 I.C.C., at 161) but "primarily on the beneficial effects this proposed merger will have upon rail patrons and the public generally." (*Ibid.*) Despite the appellants' claims, the Commission did not look simply to the savings resulting from the merger for the ultimate public benefits to be obtained; it found them also in the rationalization and improvement of service to be expected, in the form of "increased efficiency of operations, more flexible and regular schedules, faster service, increased supply of boxcars, elimination of switching charges, and reduction of freight costs by reason

[11] In connection with this argument, one of the appellants finds it necessary to misquote the District Court. It is stated that the District Court held that the factors specified in § 5(2)(c) of the Act were to be given weight over and above the competitive considerations. (FEC 9) But what the District Court held, in the passage cited by the FEC, was that the Justice Department's argument, to the effect that healthy competitors should never be allowed to merge, was "equivalent to loading the scales in favor of but one factor", the competitive factor. (FEC 37a) The District Court properly stated that: "This argument cannot, as a matter of law, be used to rewrite the statute." (FEC 36a)

of single-line rates . . . ." 320 I.C.C., at 159. Also found by the Commission was the reasonable expectation of improved service in the form of "better distribution of special freight cars"; "broader transit privileges"; "improved and expeditious freight schedules between the principal terminals"; "more flexible schedules and more direct routes"; "the elimination of interchanges and delays in transit"; "the simplification of transit arrangements and greater flexibility in arranging stop-off points"; "substitution of single-line rates on certain commodities"; "elimination of certain switching charges"; "more adequate car supply"; "availability of more specialized equipment"; "more efficient utilization of equipment"; "convenience in the settlement of claims and the tracing of cars"; and "promotion of new industrial sites, improvements in port terminal facilities and in the stabilization of employment which will flow from the greater financial stability of the merged company." 320 I.C.C., at 160-61. And there were a host of other benefits found in the Examiner's Report, adopted by the Commission. Ex. Rep. fol. 123-25; see App. B, p. 6a, *infra*.

Appellants understandably do not mention these findings; but they relate to the raw material out of which improved transportation service and the fulfillment of the national transportation policy must come; and they are voluminously supported on the record. It was, indeed, clear not only to the Commission but to the overwhelming majority of the shippers in the area served by Seaboard and Coast Line that the merger would be to the public's advantage in terms of service. As the Commission found: "The merger proposal has the support of a substantial majority of . . . shippers . . . . From the standpoint of tonnage, shippers representing approximately 90 percent of the total Sea-

board-Coast Line tonnage endorsed the merger." 320 I.C.C., at 162-63.[12]

Moreover, the Commission's findings as to the beneficial effects of the economies of the merger, and their relationship to the public interest, are also articulated and amply supported. The Commission, heavily discounting the initial estimates of the applicants, concluded that the merged operation could effect economies of at least $20,000,000 per year. (320 I.C.C., at 159, 207) The Commission made it clear that, as a regulatory agency, it would make these savings redound to the benefit of the public. See 320 I.C.C., at 167, 207. It was not, as the Commission made it clear, from the stockholders' point of view that it gave weight to the economies to be effected. (320 I.C.C., at 166) As the Examiner's Report—adopted by the Commission—pointed out, the savings and the improved service to the public are inextricably bound up. The economic savings to be yielded by the proposed merger would produce a better transportation plant,[13] providing more efficient railroad service to the public. (Ex. Rep. fol. 134) —In short, the question of savings is a fundamental element the Commission looks

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[12] Even the shippers at Tampa, where the merger, as the Commission recognized, would create certain special problems (see pp. 24-29, *infra*), indicated overwhelming support for the merger. Nineteen Tampa shippers testified in support of the merger before the Examiner invoked the cumulative evidence rule, excluding some 47 others who were awaiting the opportunity to testify in support. Only four shippers, infrequent rail users, testified to the contrary. Tr. 1768-2090; 2243-66; 2044-45; 2118-22; 2266; 2315; 2337; 2352. See 320 I.C.C., at 165.

[13] A related advantage to the public is the ending of the economic waste that is inherent in the gross underutilization of the plant of the merger applicants. The record indicated that Coast Line today is operating at no more than 25% of its capacity on the main line, and that traffic could be doubled or tripled with no difficulty whatsoever in handling it. Tr. 1458-59.

to and examines in all rail merger proceedings. The Commission has always applied and examined the concept of savings in the light of the goal of "adequacy of transportation service . . . economy and efficiency, and . . . appropriate provision and best use of transportation facilities." *Louisville & N. R. Co. Merger,* 295 I.C.C. 457, 502-03 (1957). This Court has recognized the relevance of savings to the standard of § 5(2). *McLean Trucking Co.* v. *United States, supra,* 321 U. S., at 87. Savings make common carriers stronger and better servants of the public. The merger savings here, as the Commission found, will greatly aid in developing new and modern railroad technology, adequate car supply, specialized equipment, rate reductions, industrial development services, and other advantages to the shippers and the public. See 320 I.C.C., at 160-61; Ex. Rep. fol. 136.

In this connection, the Commission, aware that marginal returns do not assure reliable carriers, noted the minimal returns earned by Seaboard and Coast Line on their operations.[14] In the two most recent years considered, Seaboard's rates of return were 3.84% and 4.65%, and Coast Line's were 2.39% and 3.52%. The Commission made the obvious finding that such rates of return do "not compare favorably with returns on investments in other industries or in other modes of transport." (320 I.C.C., at 149) The Commission very properly took the low rate of return into account, together with the extensive intermodal competition to which the railroads in general and these carriers

[14] Of course, the Commission has uniformly ruled, as here, that carriers need not be on the brink of bankruptcy to merge. *Pennsylvania R. Co.—Merger—New York Cent. R. Co.,* 327 I.C.C. 475, 494-99 (1966); *Great Northern Pac. & Burlington Lines, Inc.—Merger,* ICC Fin. Dkt. No. 21478, decided March 31, 1966, mim. p. 90; *Norfolk & W. R. Co. Merger,* 307 I.C.C. 401, 407, 441 (1959); *Louisville & N. R. Co. Merger,* 295 I.C.C. 457, 464, 482 (1957).

were subjected, as the Commission extensively found. (320 I.C.C., at 149-53, 210)

Obviously, not every railroad merger could produce such a showing, despite the suggestions of the appellants. Nor is it an adequate treatment to say, as appellants do (FEC 10), that savings are simply the other side of the coin to the elimination of competitive and hence duplicative facilities, and to the elimination, with them, of competition. For one thing, the amount of savings in the elimination of duplicating service between two carriers serving the same region will be the same regardless of whether there is a third, remaining carrier serving the region; but here the Commission relied extensively on the fact that substantial rail competition would remain for the merged carrier throughout its system, except within one problem area, to which the Commission gave special attention. Or, to take another example, in an end-to-end merger between a "bridge" carrier, strategically located, and one of a number of connecting onward carriers, there will be extensive elimination of competition but little savings. —Therefore, it is patently erroneous to charge, as do appellants, that the benefits which the Commission found were purely the results of the destruction of competition, and that accordingly the Commission weighted the scales against competition, and applied an approach which inevitably led to approval. Where the Commission finds that the benefits of a merger do not outweigh the consequences to competition, it shows no hesitancy about denying its approval. *Great Northern Pac. & Burlington Lines, Inc.,—Merger,* ICC Fin. Dkt. No. 21478, decided March 31, 1966. —The Commission's treatment of the public benefits to be obtained from the merger here is exhaustive, is based on extensive evidence, and affords a solid basis for its ultimate finding of the public interest.

2. *The Effects of Reducing Rail Competition Among Three Rail Carrier Systems to Two Rail Carrier Systems.* —The appellants charge that the Commission erred in failing to realize that where there are three competing systems which are reduced to two through a merger, competition is reduced. (Southern 28-29) But the Commission was guilty of no such fallacy. The first sentence of its discussion of competition showed its realization that the "proposed merger would result in the elimination of present competition between Seaboard and Coast Line in a six-state area." (320 I.C.C., at 163) And the Commission found that 30.9% of the Seaboard's tonnage was competitive with the Coast Line's tonnage, and that 33.4% of their combined tonnage was competitive as between them. (320 I.C.C., at 163-64) What the Commission did, however—which an administrative agency administering a "public interest" statute like § 5 can and should do, unlike a court administering a prohibitory statute like § 7 of the Clayton Act—was to view in a different light, and appraise differently, those eliminations of competition between the merger applicants where there would remain after the merger another competitive rail carrier—generally the Southern—and those where there would be none. See 320 I.C.C., at 163-64.

In the light of the effects of intermodal competition on the railroads (320 I.C.C., at 149-53, 166), the Commission clearly identified and articulated its goal; that goal was the preservation of two healthy, "balanced competitive [rail] systems" in the Southeast. (320 I.C.C., at 188) The Commission thus realized—contrary to the appellants' suggestion (Southern 23-24)—that competition could be used as a tool to further the National Transportation Policy. The Commission recognized, as had its Examiner's

Report, which it adopted, that the nature of competition in the rail industry is different from that in the manufacturing, mercantile and service industries. See Ex. Rep. fol. 153. *Cf. Pennsylvania R. Co.—Merger—New York Cent. R. Co.*, 327 I.C.C. 475, 510 (1966).

The basic competition in the railroad industry is for the high-revenue-producing long-haul traffic. That competition is not between specific originating carriers at originating points but is "route competition" for the long haul.[15] —The Commission recognized this fact of life in the railroad industry here, as it has in other rail merger cases. *Cf. Pennsylvania R. Co.—Merger—New York Cent. R. Co., supra*, 327 I.C.C., at 513. The Commission dwelt on the interlacing nature of the separate systems of the Coast Line and of the Seaboard, the distribution of their lines and other competing lines in the territory served, and the fact that a large number of points in their common territory are served by one, but not by both, of them.[16]—This is the backdrop of the necessity to unify that system in order to provide balanced competition throughout the Southern Region with the Southern.[17]—While this sort of "balanced

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[15] "Generally, the important revenue producing traffic is that which generates long hauls extending between two or more major rate territories, or are otherwise in the nature of tra continental movements. On such traffic, the through movement is handled successively by many railroads, and the competition which exists is between available routes rather than between the railroads concerned. . . . More often than not, the primary aspect of competition having bearing on the movement of important long haul traffic involves the question of which railroad is able to convince the persons responsible for the routing of the most desirable traffic, to designate the specific routes most favorable to the soliciting railroad . . . ." Ex. Rep. fol. 153-54.

[16] See 320 I.C.C., at 164-66.

[17] Thus, the Southern has always taken advantage in its advertising and promotional activities of its extensive single-carrier services. The record contains examples of Southern's advertising:

competition" approach is not permissible in a Clayton Act § 7 case (see *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963)), it is obviously permissible and essential in a § 5 proceeding before the Commission; the appellants' attack on it simply illustrates that they are persisting in the approach which this Court repudiated in its decision last Term.

3. *The Situation Within Central and Western Florida.* —The appellants claim a variety of errors with respect to the Commission's treatment of the competitive situation within central and western Florida. Essentially, it is claimed that the Commission's findings, and its appraisal and estimate of the curtailment of competition within central and western Florida, are inadequate. (Southern 30-38; Tampa 9-12)—But the Commission made an accurate estimate of the situation to be created within central and western Florida: It correctly styled it what it obviously would be, a "rail monopoly." 320 I.C.C., at 165. While it would have been possible for the Commission to have made further findings cumulative to this finding, the purpose of such findings in reiteration of the obvious, which the appellants contend for, is obscure.

What the Commission proceeded to do was to put the intramodal monopoly within central and western Florida, that would unquestionably be caused by the merger, into perspective; and then to take ameliorative steps. Thus, the

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"There's only one . . . that serves them *all*!", pointing to major South Atlantic and Gulf ports and Southern Region gateways. (Exs. H-224, H-225) As the Examiner pointed out, Southern's "routes generally serve the same terminals, and are parallel to and cross the lines of Seaboard and Coast Line, within extensive portions of the states in which they operate. Exclusive of Florida points, Southern serves practically every important point served by the Seaboard, Coast Line, and L&N." Ex. Rep. fol. 68.

Commission found that the nature of the lines of Coast Line and Seaboard was such, within central and western Florida, that the number of cities served by both of them was not great compared to the number served only by one. (320 I.C.C., at 165) Accordingly, in many cases, the merger would not operate to deprive rail shippers of any existing choice as to the originating rail carrier.

The Commission also pointed out that it was essential not to overestimate the effect of the origination point monopoly within this area, inasmuch as there were a number of interchange points with other carriers in Florida (320 I.C.C., at 165), where, to the extent through routes existed, a shipper in the central and western areas could specify an onward routing over a competitor of the Merged Carrier. The Commission pointed out the fact that in terms of the movement to the destinations at the industrial centers the Merged Carrier would be subjected to competition for the long haul. (320 I.C.C., at 166)

As a backdrop to its consideration of this situation, the Commission—which had earlier in its opinion extensively reviewed the effects of intermodal competition generally (320 I.C.C., at 149-53)—analyzed the effects of intermodal competition on the merged carrier in the area. (320 I.C.C., at 166-67; see also 320 I.C.C., at 151-53) The Commission analyzed the situation with respect to the most important of the heavy, bulkloading commodities shipped in this area, phosphate rock.[18] Here, the Commission found that al-

[18] Appellants say that the Commission should have performed a similar analysis with each of the first nine commodities carried by Coast Line and Seaboard in terms of tonnage. (Tampa 15; Southern 37) But no showing has been made that phosphate rock, the most important commodity, is not fairly representative of the situation as to the other bulk-loading commodities. This whole approach appears to be an inheritance of the view that the Commission must make Clayton Act findings, which this Court

though phosphate rock was "essentially a commodity normally handled by rail," water movements from Tampa were competitive with rail, and because of it the rail revenues on phosphate rock were being driven downwards.[19] (320 I.C.C., at 152-53) The Examiner's Report, adopted by the Commission, recites the evidence as to the movement of phosphates and other bulk-loading commodities by water from Florida points. (Ex. Rep. fol. 38) The Commission observed that: "The competition faced by the railroads from other modes of transport in the Tampa area is most apparent with respect to the movement of phosphate rock." (320 I.C.C., at 153)[20]

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rejected last Term. Moreover, it is somewhat mysterious why the Commission would be safe, under the appellants' view, if it stopped at analyzing only nine commodities. Undoubtedly if the Commission had expressly analyzed nine, appellants would now cry for nineteen.

[19] Tampa itself admits that phosphate rock is "by far the single most important commodity to the maintenance, development and growth of Tampa's port." (Tampa 11) Obviously, considerable intermodal competition to the railroads on this commodity is presented by rail-water movements or truck-water movements through Tampa. Indeed, in the light of this expressed interest in its port, one may legitimately wonder whether Tampa is interested in attempting to block the merger because of its stated concern over the elimination of rail competition between the Seaboard and the Coast Line, or whether because it fears that the Merged Carrier will be able more effectively to compete for the long-haul movements with water carriage movements passing through the port of Tampa.

[20] The appellants assert that the Commission's finding that phosphate rock is normally carried by rail, and its finding that the railroads face severe competition from other modes in carrying it, are inconsistent. (Southern 37; Tampa 16) It is hard to grasp the kind of thinking that finds these two propositions inconsistent. What the Commission is saying, as even a cursory reading of the context of its remarks would indicate, is that even on the heavy, bulk-loading commodities, like phosphate rock, normally carried by rail, there is increasing intermodal competition. The findings simply and vividly demonstrate the plight of the railroads in the face of this ubiquitous intermodal competition.

Putting the rail monopoly to be created by the merger within central and western Florida in this perspective, the Commission determined to apply a set of conditions that would, notwithstanding the situation created within Florida, permit it to find that the merger was consistent with the public interest. As the Commission stated: "Absent suitable protective conditions and consideration of these [public advantage] factors, there is a distinct possibility that the proposed transaction would tend to lessen competition to an extent which would contravene the policy underlying the antitrust laws. Here, however, it is clear that the benefits of this merger, when viewed in the light of the conditions hereinafter imposed, will greatly outweigh the potential injuries and hence the policy underlying the antitrust laws does not represent a barrier to its approval." 320 I.C.C., at 167.

The appellants understandably do not dwell upon the conditions ordered by the Commission, but even a brief study of those conditions—which we set forth in Appendix A—demonstrate that they were imposed for the purpose, and would have the effect, of dealing with the competitive problems in the various problem areas which the Commission recognized.

In the context of the situation in central and western Florida, the central condition is Condition 8, which requires the Merged Carrier to open and maintain through routes and joint rates with the Southern through the Jacksonville gateway. (App. A, pp. 2a-3a; App. C, p. 12a, *infra*) —In the absence of such a condition, neither the Seaboard or the Coast Line unmerged, nor the Merged Carrier, would have been required to open any through routes or establish any joint rates at Jacksonville—the principal rail gateway into Florida—which would have had the effect of

"short-hauling" them on traffic which they originated.[21] But with this condition, the Southern will be able to compete for the long haul of the traffic from Jacksonville to its ultimate destination. —The Commission and its Examiner both realized that the essential competition in the rail industry was route competition, for the long haul. (See pp. 5-6, 23-24, *supra*) Thus, as the Commission pointed out, through the imposition of Condition 8, opening the Jacksonville gateway, it was able to counterbalance the effects of the rail monopoly within central and western Florida created by the merger. (320 I.C.C., at 181, 182, 184) Accordingly, by giving the Southern access to the profitable long haul on shipments originating in central and western Florida, the Commission, through Condition 8, made competitive rail service by the Southern available for the first time to shippers in central and western Florida, and thus fulfilled its design of developing two strong, balanced, competitive systems in the Southern Region. (320 I.C.C., at 188)

Indeed, the Commission's imposition of this condition is a vivid example of the difference between an antitrust suit—to which the appellants insist on analogizing this proceeding—and a flexible administrative proceeding. Through

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[21] Because of this, the Coast Line and the Seaboard have not generally established through routes with the Southern at the Jacksonville gateway with respect to traffic originated by them in Florida. Absent an event such as the proposed merger, where the Commission's powers are more extensive through the conditioning power (*Atlantic Coast Line R. Co.* v. *United States*, 284 U.S. 288 (1932)), the power of the Commission to require the opening of through routes by an originating carrier, where the effect would be to require the originating carrier to "short haul" itself, is expressly limited by the statute. §15(4), 49 U.S.C. § 15(4). The power may only be exercised upon the making of a special finding to the effect that either the short-hauling is necessary to prevent an "unreasonably long" route, or that the short-haul route "is needed in order to provide adequate, and more efficient or more economic transportation." (*Ibid.*)

the conditioning power—a power not shared by the courts in an antitrust matter—the Commission, which clearly perceived, as the District Court found, the specific problem areas in the merger, was able to devise a solution, drawn from its experience in rail transportation, that was adequate to the competitive problem.

4. *The Track Transfer Contention.*—Southern urges that the Commission erred in not conditioning the merger upon the grant of the particular self-interest project which it has pursued throughout these proceedings, that is, the transfer to Southern by the Merged Carrier of a line of its road between Jacksonville and Tampa and points south. (Southern 9, 40-43) —In essence, of course, this contention simply goes to the question of which conditions are appropriate to preserve competition for the long-haul with respect to traffic originating in central and western Florida —the trackage sale condition requested by Southern, or the Jacksonville gateway condition, and the other conditions, imposed by the Commission. Clearly, this is a question which is entrusted solely to the Commission's judgment. Southern shows no basis for the courts to second-guess the Commission's solution as to the proper remedy.

Southern contends that, inasmuch as the Commission characterized its request as "an invasion of territory" now adequately served by the applicants (320 I.C.C., at 187), the Commission's action amounted to an erroneous favoring of the private interest of the applicants over the public interest. —But the principle of noninvasion of another carrier's territory absent a positive showing of public need is one which the Act itself recognizes (See § 1(18), 49 U.S.C. § 1(18));[22] and while the Commission recognized

[22] § 1(18) came into the statute at the same time as the first special provision for mergers. Transportation Act of 1920, 41 Stat. 456, 477.

its power to impose such a condition upon a merger, despite § 1(18) (*cf. Atlantic Coast Line R. Co.* v. *United States*, 284 U.S. 288, 294-95 (1932)), the Commission determined not to do so since Southern's loss of traffic and revenue from the merger (subject to the gateway condition at Jacksonville) would be insignificant, and since there was no "public need for additional service" with respect to the short haul between Jacksonville and Tampa and points south. (320 I.C.C., at 187, 209) The Commission also found that the proposal, which would require the continued duplication of facilities, would "frustrate the over-all objectives of the merger." The Commission found the condition unacceptable not because of its private effect, but because it would amount to a "detriment of the public interest." (320 I.C.C., at 187) Certainly on this basis Southern has not demonstrated that the Commission exceeded its powers in its choice between the two means of ensuring that Southern would serve to offer balanced competition to the Merged Carrier on shipments originating in central and western Florida.

In an effort to generate an issue of law, Southern claims that the Commission applied an improper standard in passing on the proposed condition. It claims that the Commission should not have judged the proposed condition in terms of whether there was a "public need" for it, but simply in terms of whether it was "just and reasonable." (Southern 42-43) This is a bizarre reading of the statute. The relevant language is that: "If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed [merger] transaction . . . will be consistent with the public interest, it shall enter an order approving [the transaction] . . . ." § 5(2). While under this language, the Commission must find a condition to be "just and reason-

able" before it can impose it,[23] it obviously is not under a duty to impose *every* condition that every intervenor propounds which might happen to be "just and reasonable." Railroad mergers are required to be, after all, voluntary proposals. See *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298 (1954). The statute plainly says that the Commission is required to impose conditions on merger proposals only to the extent necessary to ensure that the proposal "will be consistent with the public interest." While only those conditions which are "just and reasonable" may be imposed, it does not follow that every condition which is tendered *must* be imposed unless it is affirmatively found not to be "just and reasonable"; the Commission is required only to apply conditions to the point necessary to make the proposed transaction consistent with the public interest.[24] See 320 I.C.C., at 127. Southern's contention as to the application of an erroneous standard by the Commission is accordingly without foundation.

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[23] The passage quoted by Southern from the *Great Northern* case (Southern 43) simply says that, where the Commission determines to impose a condition, the test under § 5(2) is whether the condition is "just or reasonable," even though, absent a merger, the imposition of the same remedy might require a special finding of a sort difficult to make. *Cf. Atlantic Coast Line R. Co.* v. *United States*, 284 U.S. 288 (1932). This simply tells us when the Commission may impose a condition, not when it must.

[24] Even if the standard were whether the condition was "just and reasonable," Southern has shown no prejudice from the Commission's failure to use the words "unjust and unreasonable." After all, the Commission found that the proposal "would, to a large extent, require the dismemberment of the merged company's lines, interfere with the merged company's planned economies, and in general frustrate the overall objectives of the merger, all to the detriment of the public interest." It also found that the transfer would be "primarily for the benefit of [Southern]," and "would deprive the merged company of substantial revenues." (320 I.C.C., at 187, 209-10) Clearly, this is tantamount to a finding that the proposed condition was not "just and reasonable."

5. *The Divestiture of the L&N.* —Finally, Southern contends that the Commission erred in not imposing a condition that the Merged Carrier divest itself of control over the Louisville and Nashville Railroad. Control of the L&N is now held by Coast Line through ownership of 33.69% of its stock; this stock interest would of course pass to the Merged Carrier.

The Commission considered this contention at length and considered detailed analyses of the position of the L&N in terms of the dynamics of route competition between railroads. The Southern's contention (Southern 45) that the Commission failed to analyze the degree of favoritism that would be practiced by the Merged Carrier and the L&N is baseless. First, the Commission analyzed the Coast Line's present control, and the extent—fairly minimal—to which it had historically used it to dictate routings. (320 I.C.C., at 188) The Commission extensively analyzed the restraints upon such an exercise of that control, particularly the powers of the Illinois Central and the Gulf, Mobile and Ohio, area competitors of the L&N, to effect reprisals against diversions from them to the L&N by the Merged Carrier. (320 I.C.C., at 189)

The Commission, through its administrative conditioning power, took the situation in hand. It developed this reprisal power of the Illinois Central and the Gulf, Mobile and Ohio by strengthening the position of the Southern through the Jacksonville gateway condition (Condition 8) discussed above, pp. 28-30, *supra,* and through Condition 12 requiring the merged carrier to grant the Central of Georgia (a Southern subsidiary) trackage rights between Albany and Tifton, Georgia. That would permit the Illinois Central and the Gulf, Mobile and Ohio to give the Southern the long-

haul straight through to Jacksonville[25] on southbound traffic, in reprisal against any diversionary attempts by the Merged Carrier against them, through the use of the L&N. (320 I.C.C., at 208)

The Commission, after its analysis and appraisal, concluded that, giving effect to the conditions it had imposed, the favoritism which the Merged Carrier would show the L&N would not be extensive, and that divestiture was not required. —Once again, here, the Commission used its administrative powers to ensure competitive balance. See 320 I.C.C., at 184. Southern suggests that the Commission did not realize the antitrust implications of the control of one corporation over another (Southern 45-46); on the contrary, not only did the Commission recognize this obvious fact, but it administratively provided a method whereby this relationship could be effectively kept in check.[26] Southern's contention here, too, is simply that the Commission should have imposed one condition rather than another.

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In short, as the District Court observed, the Commission here properly used the policies and tools of the antitrust laws, "to help pinpoint the danger areas" with respect to the foreclosure of competition. (FEC 14a) The Commission "estimated the scope and appraised the effects of the curtailment of competition which will result" from the proposal. *Minneapolis & St. L. R. Co.* v. *United States*, *supra*, 361 U.S., at 186; *McLean Trucking Co.* v. *United States*, *supra*, 321 U.S., at 87; *Seaboard Air Line R. Co.* v. *United*

[25] The Southern already has an excellent line between Tifton, Georgia, and Jacksonville. (320 I.C.C., at 183)

[26] The Southern also contends that the Commission applied the wrong standard in rejecting the divestiture condition. (Southern 45) For the reasons developed above, this argument is without merit. See pp. 31-32, *supra*.

States, supra, 382 U.S., at 155. It perceived the danger areas after making this estimate and appraisal; it used its administrative tools to minimize the harms to competition in these areas; and it, on the basis of substantial evidence, drew the ultimate conclusion that, balancing the benefits and the harms of the merger, the merger met the test of the public interest set forth in § 5(2) of the Act. In short, the Commission did precisely what this Court's decisions in *McLean* and *Minneapolis* said it had to do, and which this Court's decision last Term in this very case confirmed.

CONCLUSION

This merger application has already been pending before the Commission and the courts for over six years. It has been pending before the courts, at this writing, for 32 months, and already has twice had the attention of the District Court and once the attention of this Court. The contentions asserted by appellants on the issues of competition and the public interest amount essentially to an effort to try *de novo* in this Court issues which are committed to the Commission's discretion.—But the function of a court reviewing a Commission order is "limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536 (1946).

In the light of these considerations, we submit that this proceeding should at last be brought to an end and that the judgment of the District Court should be summarily affirmed. This Motion to Affirm accordingly should be granted.

Respectfully submitted,

PAUL A. PORTER
DENNIS G. LYONS
1229 Nineteenth Street, N. W.
Washington, D. C. 20036
Attorneys for Appellees Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, The Atlantic Coast Line Company, and Mercantile-Safe Deposit and Trust Company

Of Counsel:

HAROLD J. GALLAGHER
WALTER H. BROWN, JR.
WILLKIE FARR GALLAGHER WALTON & FITZ GIBBON
New York, New York

RICHARD A. HOLLANDER
Richmond, Virginia

PRIME F. OSBORN, III
JOHN W. WELDON
PHIL C. BEVERLY
Jacksonville, Florida

EDWIN H. BURGESS
Baltimore, Maryland

ARNOLD & PORTER
Washington, D. C.

November, 1966

APPENDIX A

The Routing and Gateway Conditions

[APPENDIX XI TO THE COMMISSION'S REPORT]
[320 I.C.C., at 267-69]

1. Upon consummation of the merger, the Seaboard Coast Line Railroad Company shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until otherwise authorized by the Interstate Commerce Commission.

2. The present neutrality of handling traffic inbound and outbound by the applicants shall be continued so as to permit equal opportunity for service to and from all lines reaching the rails of these carriers without discrimination as to routing or movement of traffic and without discrimination in the arrangement of schedules or otherwise.

3. The present traffic and operating relationships, including, among other things, interchange arrangements and switching practices, between the applicants, on the one hand, and all lines connecting with their tracks, on the other, shall be continued insofar as such matters are within the control of the Seaboard Coast Line Railroad Company.*

4. Seaboard Coast Line Railroad Company shall accept, handle, and deliver all cars inbound and outbound, loaded or empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers, and irrespective of destination or route of movement.

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* The proposed name of the Merged Carrier.

5. Seaboard Coast Line Railroad Company shall not do anything to restrain or curtail the right of industries now located on lines of the applicants to route traffic over any or all existing routes and gateways.

6. Seaboard Coast Line Railroad Company shall preserve and maintain the same schedules on the present freight trains of Seaboard and Coast Line which the merged company would continue after consummation of the merger; unless such schedules, after revision, would provide later departure times and/or earlier arrival times at junctions and gateways in such a manner that the existing cutoff times for connecting trains of other railroads would not be changed, or, would not cause or permit such connections to be delayed or broken.

7. Seaboard Coast Line Railroad and its connections shall open new routes, and maintain thereover competitive joint rates and just and equitable divisions thereof in connection with Norfolk Southern Railway Company via Wilson, N. C., via Fayetteville, N. C., and via Raleigh, N. C., on all traffic moving between (i) all stations on the Seaboard Coast Line Railroad Company and its connections south of Norfolk Southern's line, on the one hand, and (ii) Norfolk, Va., and points in official territory located in the Buffalo-Pittsburgh, eastern trunk line, and New England territories, including, Canada, on the other; provided, that this condition shall be in effect only as long as Norfolk Southern remains an independent railroad.

8. Seaboard Coast Line Railroad Company shall, as to all traffic (except traffic restricted by the terms of the existing Hardeeville-Jacksonville trackage agreements), be required to maintain, in connection with the Southern and its affiliates to and from the Jacksonville gateway, joint rates

no higher than the rates applicable over the lines of the merged company through that, or any other, gateway: Provided, however, that Southern and its affiliates will extend similar reciprocity to the merged company with respect to all traffic interchanged by Southern or its affiliates at the Jacksonville gateway.

9. At the request of Southern Railway Company, presented in writing not more than 12 months after the date of consummation of the merger authorized herein, or not more than 12 months after the effective date of any certificate of the Commission permitting abandonment by Seaboard Coast Line Railroad Company of any line of railroad directly affecting the lines described in this condition, Seaboard Coast Line Railroad Company shall cancel the existing trackage agreements under which Southern Railway operates over lines of the Atlantic Coast Line Railroad Company, between Hardeeville, S. C., and Jacksonville, Fla., and shall refrain from opposing or in any manner protesting any request by Southern Railway for permission under section 1(18)-(20) to abandon operations pursuant to the aforesaid trackage agreements.

10. At the request of Southern Railway Company, presented in writing not more than 6 months after the date of consummation of the merger authorized herein, or, not more than 6 months after the effective date of any certificate of the Commission permitting abandonment by Seaboard Coast Line Railroad Company of any line of railroad directly affecting the lines described in this condition, Seaboard Coast Line Railroad Company shall cancel the existing trackage agreements under which Southern Railway operates over lines of the Atlantic Coast Line Railroad Company between Selma, N. C., and Pinners Point, Va.;

and shall refrain from opposing or in any manner protesting any request by Southern Railway for permission under section 1(18)-(20), to abandon operations pursuant to the aforesaid trackage agreements.

11. Seaboard Coast Line Railroad Company shall be required to transfer to the Southern Railway Company, by sale or long-term lease, or the grant of trackage rights, or a combination thereof, a line of railroad from a connection with the Southern Railway in Jacksonville to the mill of St. Regis Paper Company at Quinlan, Fla., upon such terms as the carriers may agree or, in the event of their disagreement, upon such terms as the Commission may, after subsequent hearing, find to be just and reasonable, all subject to the approval of the Commission upon the filing of an appropriate application.

12. Seaboard Coast Line Railroad Company shall be required to grant trackage rights to the Central of Georgia Railway Company over the track of the merged company between Albany and Tifton, Ga., upon such terms as the carriers may agree, or, in the event of their disagreement, upon such terms as the Commission may, after subsequent hearing, find to be just and reasonable, all subject to the approval of the Commission upon the filing of an appropriate application: Provided, however, that this condition shall be null and void unless the Central of Georgia Railway Company requests such trackage rights within 1 year from the date of consummation of the merger herein authorized.

13. Any party or person having an interest in the subject matter herein, at any future time, may make application for such modification of the conditions prescribed as part of the authorization herein, or any of them, as may be

required in the public interest; and jurisdiction will be retained by the Commission to reopen the proceeding herein on its own motion for the same purpose.

14. The Commission will retain jurisdiction for a period of five years following the date of consummation of the merger to permit the filing of petitions by the carriers by railroad specified in the report herein, for inclusion in the transaction. The Seaboard Coast Line Railroad Company will be required to negotiate in good faith with respect to the proposals for inclusion presented to it by such petitioning railroads and to cooperate to the fullest extent in the compilation of an adequate record to provide a basis for the required determination by this Commission as to whether such transaction would be consistent with the public interest. In the event the parties are unable to agree, and the Commission after hearing concludes that the transaction would be consistent with the public interest, it will issue an order directing the Seaboard Coast Line Railroad Company to include the petitioning railroad upon such terms and conditions as the Commission finds to be just and reasonable.

APPENDIX B

The Commission's Order of December 2, 1963

At a Session of the

INTERSTATE COMMERCE COMMISSION
held at its office in Washington, D. C.,
on the 2nd day of December A.D. 1963.

Finance Docket No. 21215

SEABOARD AIR LINE RAILROAD COMPANY—
MERGER—ATLANTIC COAST LINE RAILROAD
COMPANY

Finance Docket No. 21254

ATLANTIC COAST LINE RAILROAD COMPANY
BONDS

Investigation of the matters and things involved in these proceedings having been made, a hearing having been held, oral argument having been heard, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report and the report of the hearing examiner is hereby referred to and made a part hereof:

It is ordered, That the motions of several intervenors that the application be dismissed, be, and they are hereby, denied;

It is further ordered, That the petition of Florida East Coast Railway Company for further hearing be, and it is hereby, denied;

It is further ordered, That subject to the terms, conditions and modifications referred to in the aforesaid report, (a) the merger of the properties and franchises of the Atlantic Coast Line Railroad Company into the Seaboard Air Line Railroad Company (name to be changed to Seaboard Coast Line Railroad Company) for ownership, management and operation; (b) the acquisition by the latter of sole or joint control of carriers subsidiary to or affiliated with the Atlantic Coast Line Railroad Company through ownership of stock or lease; (c) the acquisition by the Seaboard Air Line Railroad Company, as successor in interest, of trackage rights and joint use of certain lines of railroad now used by the Atlantic Coast Line Railroad Company; (d) the transfer of the outstanding motor carrier operating rights of Atlantic Coast Line Railroad Company to the Seaboard Air Line Railroad Company pursuant to the approved plan of merger; and (e) by virtue of such merger, the acquisition of control of Seaboard Air Line Railroad Company, the surviving corporation, by Atlantic Coast Line Company and, in turn, the acquisition of indirect control of Seaboard Air Line Railroad Company by Mercantile-Safe Deposit and Trust Company, be, and they are hereby, approved and authorized.

It is further ordered, That (a) the issuance by Seaboard Air Line Railroad Company of 3,839,345 shares of $20 per share par value common stock and scrip certificates representing fractional shares in conversion of outstanding capital stock of the Atlantic Coast Line Railroad Company pursuant to the aforesaid plan of merger, and (b) the assumption by the said Seaboard Air Line Railroad Company of the obligations and liabilities of the Atlantic Coast Line Railroad Company existing on the date of the merger, including obligations of companies subsidiary to or affiliated with the latter, which are contingently guaranteed either

solely by Atlantic Coast Line Railroad Company, or jointly with other guarantors, upon the terms and for the purposes described, be, and they are hereby, authorized;

It is further ordered, That (a) the proposed Modification Indenture of the Atlantic Coast Line Railroad Company to the First, Second, Third and Fifth Supplemental Indentures, dated March 1, 1950, June 30, 1952, July 1, 1952, and March 1, 1955, respectively, to its General Mortgage dated March 1, 1950, modifying the sinking fund requirements with respect to its Bonds of Series A, B, C and D, in the manner and form set forth in the application filed in Finance Docket No. 21254 and in the proposed Modification Indenture, all as described in the aforesaid report, be, and it is hereby, authorized, contingent upon and concurrent with the consummation of the merger herein authorized, and (b) the Commission's Orders of May 26, 1950, in Finance Docket No. 16961; April 10, 1952, in Finance Docket No. 17667; June 23, 1952, in Finance Docket No. 17791; and March 25, 1955, in Finance Docket No. 18874 be, and they are hereby, modified accordingly;

It is further ordered, That, except as herein authorized, the aforesaid securities shall not be sold, pledged, repledged, or otherwise disposed of by Seaboard Air Line Railroad Company, or by the Atlantic Coast Line Railroad Company, or by the merged company, unless or until so ordered or approved by the Commission;

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said securities or dividends thereon on the part of the United States;

It is further ordered, That the merged company shall report concerning the matters involved herein in conformity

with the orders of the Commission, Division 4, dated August 9, 1946, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 56.4 and 56.6);

It is further ordered, That the merged company, when establishing changes in tariffs, rates and charges as may be required in effectuation of transactions approved herein may do so upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and shall in schedules making such changes refer to this order by date and docket number;

It is further ordered, That if the authority herein granted is exercised, the merged company shall submit for the consideration and approval of the Commission three copies of the journal entries required to record the transactions authorized herein;

It is further ordered, That this certificate and order shall become effective from and after 30 days from the date of service;

And it is further ordered, That, if the authority granted in the certificate herein is not exercised within one year from the effective date of this order, it shall be of no further force and effect.

By the Commission.

Harold D. McCoy
Secretary

(SEAL)

APPENDIX C

The Commission's Order of March 4, 1964, on Petitions for Reconsideration

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of March A. D. 1964.

Finance Docket No. 21215

SEABOARD AIR LINE RAILROAD COMPANY—
MERGER—
ATLANTIC COAST LINE RAILROAD COMPANY

Finance Docket No. 21254

ATLANTIC COAST LINE RAILROAD COMPANY
BONDS

Upon consideration of the record in the above-entitled proceeding, of the petitions, filed January 13, 1964, on behalf of (a) Union Bag-Camp Paper Corporation, (b) Florida East Coast Railway Company, (c) Gulf, Mobile and Ohio Railroad Company, (d) Illinois Central Railroad Company (including request for oral argument), (e) Central of Georgia Railway Company and Savannah & Atlanta Railway Company, (f) Southern Railway Company et al., and (g) Railway Labor Executives' Association, for reconsideration of the report and order of December 2, 1963; and of the reply of applicants, filed February 3, 1964; and

It appearing, That the employee-protective conditions set forth in *Southern Ry. Co.—Control—Central of Georgia*

Ry. Co., 317 I.C.C. 557, as supplemented in 317 I.C.C. 729, were imposed herein; that on February 27, 1964, the said conditions were clarified; and that such conditions as clarified are, and continue to be, applicable to this proceeding;

It further appearing, That, subject to certain restrictions, the Southern Railway Company operates over a line of the Atlantic Coast Line Railroad Company between Hardeeville, S. C., and Jacksonville, Fla., via Savannah, Ga., under trackage agreements with the said Atlantic Coast Line Railroad Company; that the said trackage agreements, as interpreted by the parties thereto, may preclude the Southern Railway Company from interchanging freight traffic at Savannah with either Central of Georgia Railway Company or the Savannah & Atlanta Railway Company in connection with movements to, from, or through the Jacksonville gateway;

It further appearing, That Condition 8, relating to the opening of the Jacksonville gateway by the merged company should be clarified and modified to require the Seaboard-Coast Line Railroad Company to provide the Central of Georgia Railway Company, the Savannah & Atlanta Railway Company and other affiliates and subsidiaries of the Southern Railway Company with the right to interchange freight traffic with the Southern Railway Company at Savannah in connection with movements to, from or through the Jacksonville gateway via the Hardeeville-Jacksonville segment;

And it further appearing, That, except as the petitions are granted for the purpose of the modification herein approved, the material matters set forth in the petitions have been considered by the Commission and discussed in its report, that the decision is based on adequate findings supported by the record, that there has been presented no error of fact or law with respect to the matters complained

of by petitioners, that no showing has been made warranting reconsideration of the said decision, and that further oral argument is unnecessary:

It is ordered, That the proceeding be, and it is hereby, reopened for reconsideration solely for the purpose of modifying Condition No. 8 of the routing and gateway conditions; and that the said condition be, and it is hereby, modified as follows:

Condition No. 8, after the word "gateway" at the end of Condition No. 8, delete period, insert comma in lieu of period, and add the following:

and, *Provided further* that the Seaboard Coast Line Railroad Company shall take such further action as may be necessary to permit the interchange of freight traffic between Southern Railway Company and Central of Georgia Railway Company, Savannah & Atlanta Railway Company and other affiliates and subsidiaries of the Southern at Savannah in connection with movements to, from, or through the Jacksonville gateway by the Southern Railway Company under existing trackage arrangements permitting operations by that rail carrier between Hardeeville and Jacksonville over a line of the Seaboard Coast Line Railroad Company.

It is further ordered, That in all other respects the said petitions be, and they are hereby, denied.

And it is further ordered, That the order of December 2, 1963, as herein modified, shall become effective from and after 35 days from the date of service.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)

Nos. 638, 639, and 641

NOV 29 1966

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, ET AL.

CITY OF TAMPA, FLORIDA, *Appellant*

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, ET AL.

SOUTHERN RAILWAY SYSTEM, *Appellant*

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

~~APPLICATION FOR LEAVE TO FILE AS~~ AMICUS CURIAE, MEMORANDUM IN OPPOSITION TO ~~S~~ MOTIONS TO AFFIRM SUMMARILY

LEWIS W. PETTEWAY
General Counsel,

B. KENNETH GATLIN
Assistant General Counsel,

FLORIDA PUBLIC SERVICE COMMISSION
700 South Adams Street
Tallahassee, Florida.

November 29, 1966.

IN THE

Supreme Court of the United States

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v.

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SOUTHERN RAILWAY SYSTEM, *Appellant*

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UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

APPLICATION FOR LEAVE TO FILE AS AMICUS CURIAE. MEMORANDUM IN OPPOSITION TO A MOTION TO AFFIRM SUMMARILY

The Public Service Commission of the State of Florida hereby moves this Honorable Court for leave, as *amicus curiae,* to file the attached memorandum in opposition to appellees' motions to affirm summarily

and urge this Court to give plenary consideration to that portion of the petitions seeking summary affirmance.

The reasons for the motion are:

(1) The Public Service Commission is vitally concerned about the effect of this merger on the entire State of Florida and is particularly concerned about the rail monopoly that will be created in central and western Florida.

(2) The District Court has stated in its opinion in this case that the merger will have its greatest impact on traffic originating and terminating in Florida and on traffic which is relatively immune from intermodal competition.

(3) The effect of the merger on transportation in the State of Florida will be considerable. The interest of the State of Florida in this case is substantial, and while we express no view as to whether or not the merger is in the public interest, we do submit that the importance of the case is such that the Court should note probable jurisdiction and give plenary consideration to the matter.

Respectfully submitted,

LEWIS W. PETTEWAY
General Counsel,

B. KENNETH GATLIN
Assistant General Counsel,

FLORIDA PUBLIC SERVICE COMMISSION
700 South Adams Street
Tallahassee, Florida.

November 29, 1966.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Nos. 638, 639, and 641

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, ET AL.

CITY OF TAMPA, FLORIDA, *Appellant*

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, ET AL.

SOUTHERN RAILWAY SYSTEM, *Appellant*

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MEMORANDUM IN OPPOSITION TO MOTIONS TO AFFIRM

The Interstate Commerce Commission has approved a merger that eliminates all rail competition below Jacksonville, Florida, except such competition by the Florida East Coast Railway as will exist on the east coast of Florida. The record indicates that the merged carrier will have approximately 81 percent of the rail trackage within the state.

The lower court opinion makes it clear that the approval of this merger will have serious effects on traffic originating and terminating in central and western Florida, a rapidly expanding economic area where the merging carriers are presently the only two railroads operating and where so much of their bulk loading traffic originates and terminates. This area accounted in 1957, the latest date for which figures are available in the record, for over $100,000,000 in freight revenues to the two carriers (Ex. R., pp. 70, 71). The record in the case shows that rail traffic originating and terminating at points in Florida common only to the two railroads amounts to more than 17,000,000 tons, and earnings to almost $60,000,000 (Ex. H. 213, pp. 1, 3). It is this traffic that will be affected by the proposed merger.

The record also shows that no rail competition will exist at points in central and western Florida at which 43,000,000 tons of traffic originate or terminate. Of this, 36,000,000 tons, or about 80 percent, is rail traffic and amounts to some 35 percent of the total tonnage of 102,000,000 tons carried by the two railroads (Ex. H. 36, Statement T; Ex. H. 38).

The lower court recognized the impact of this merger in Florida, stating that:

> "As shown by the record, these railroads receive a substantial increment of their revenue from traffic originating in Florida. It is precisely on this traffic that the monopoly created by the merger will have its greatest impact." FEC App., p. 23a.

We believe that the Court should note probable jurisdiction and determine whether the Commission's findings comply with the requirements stated by this Court in *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87 (1944).

The lower court has made it abundantly clear that water carriers will not supply competition with this merged railroad for this bulk loading traffic. The court also made clear that the effect of the rail monopoly that will be created in the carriage of these products, nearly all of which are crucial to the economy of Florida, will not be minimized by any intermodal competition. The court below said that "railroads enjoy a decided economic advantage over all other modes of transport on heavy, long, bulk-haul products in central and western Florida" (FEC App., p. 20a). This Court should determine whether the Commission made adequate findings based on substantial evidence as to the effect of this merger on shippers and the public.

This is an important case, particularly to Florida; important issues are presented as to whether the Commission properly estimated the scope and appraised the effects of the curtailment of competition that would result from the merger.

While we take no position as to whether this merger should eventually be approved or rejected, we submit that this matter is worthy of plenary review by this Court and that the Court should therefore note probable jurisdiction.

Respectfully submitted,

LEWIS W. PETTEWAY
General Counsel,

B. KENNETH GATLIN
Assistant General Counsel,

FLORIDA PUBLIC SERVICE COMMISSION
700 South Adams Street
Tallahassee, Florida.

November 29, 1966.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 638

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal from the United States District Court for the Middle District of Florida, Jacksonville Division

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REPLY OF APPELLANT, FLORIDA EAST COAST RAILWAY COMPANY, TO MOTIONS TO AFFIRM

In our jurisdictional statement we pointed out that the "foremost" benefit found by the Commission to justify this merger was the anticipated annual savings of some $20 million per year, more than half of which was to be realized from the elimination of unnecessary jobs and the relocation of employees. We argued that the Interstate Commerce Commission made no findings to establish the essential connection between the private benefits to the merged carrier represented

by these savings and the public interest, or to establish that dollar savings to these financially healthy railroads resulting from the elimination of non-excessive competition is a public benefit. We also argued that the Commission's disregard of rail competition and reliance on intermodal competition was not supported by the record and flatly contradicts the National Transportation Policy established by Congress. The Solicitor General of the United States in a memorandum filed with the Court has also noted this latter error, as have the other appellants in the case, and we see no need for further comment on this point. Further comment is, however, desirable on the issue of the alleged benefits resulting from savings anticipated from the merger because of recent developments affecting this proposed merger.

The Commission's motion to affirm does not consider the argument, but the appellee railroads respond by saying that the Commission made clear that, as a regulatory agency, it will see to it that the anticipated savings redound to the benefit of the public, citing pages 167 and 207 of the Commission's report. The Commission at page 167 is relying upon its regulatory power over competition; it is not dealing with savings. At the latter page, the Commission simply states that these savings "should" ultimately bring about a reduction in the cost of rail service, assure adequate future transportation service in the southeast (the Commission does not find rail service to be inadequate), and permit a more coordinated, economical, efficient, and expeditious service to the public. This is not a finding. It is merely an expression of hope and is based on the Commission's assumption that a railroad monopoly will pass on savings to the public—an assumption without foundation in law, policy, or regulatory experience.

The recent labor agreement, entered into between the unions who were opposing the merger and the merging railroads, reported to this Court on November 3, 1966, in No. 640, establishes that the findings and assumptions of the Commission with respect to this "foremost" benefit are plainly invalid. The agreement, nine copies of which appellant has supplied to the Clerk of the Court, is basically an "attrition" agreement; that is, the merged carrier will take over and continue to employ all employees of the merging railroads and no employee will be deprived of employment or placed in a worse position with respect to compensation, rules, or working conditions, as a result of this merger. This agreement goes far beyond the employee protective conditions prescribed by the Commission and, as pointed out in the *Atlantic Coast Line News* of September-October 1966, attached hereto as Appendix A, gives "greater coverage" than the Commission order.

This greater coverage, of course, means that the anticipated labor savings of over $10 million will not be realized, at least to some as yet undetermined extent, and thus a substantial part of the "public benefit" of the merger disappears.

More importantly, this attrition agreement was made despite the fact that the Commission had already determined in this very case that attrition conditions requested by the unions were not consistent with the public interest (320 I.C.C. at 201).

The Commission in its report in this case noted that the Railway Labor Executives' Association requested "the imposition of certain attrition conditions." These conditions were that "(a) upon the effective date of

our order the merged company would take into its employment all employees of the merging carriers and (b) no employee who was actively employed by either of the merging carriers on the filing date of the application would be deprived of employment or placed in a worse position with respect to compensation because of the merger." The Commission rejected these conditions stating that "the applicants estimate that such conditions might cost the merged company over $170 million in wages and payroll taxes for unnecessary employees." The Commission found that even though this estimate may be far from exact "it is reasonably foreseeable that the cost would be prohibitive." Thus, the Commission held that "we are unable to conclude that conditions requiring the retention of employees in unnecessary positions would be consistent with the public interest or sound business policy" and that the "imposition of such conditions would unduly restrict carriers in the establishment of more economical operations, and would be in conflict with the objectives of the National Transportation Policy" (320 I.C.C. at 201).

We are not dealing with the fairness to the employees or the merging carriers of the new agreement. Nor are we concerned with the right to enter into such an agreement under section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f). However, in view of the Commission's findings as to the public interest in the savings to be achieved by reduction in employment and as to attrition conditions being inconsistent with the public interest, we believe the new agreement invalidates the order of the Commission authorizing this merger. The agreement destroys the basic premise upon which the Commission's approval was based.

At a very minimum, we submit that the Commission must determine whether this new agreement eliminates or substantially reduces the savings which the Commission hoped would be passed on to the public. It is obvious that, if the potential savings have been substantially reduced, even the Commission's hopes for public benefits from this merger are impossible of realization. Unless, as we contend, dollar savings are not a public benefit, in which event the Commission's approval must be set aside, the Commission must consider whether the public benefits to be realized from continued competition outweigh the reduced savings and other possible benefits now in prospect.

Respectfully submitted,

A. ALVIS LAYNE
EUGENE M. MALKIN
948 Pennsylvania Building
Washington, D. C. 20004

Attorneys for Appellant
Florida East Coast
Railway Company

FREDERICK H. KENT
Florida National Bank Building
Jacksonville, Florida 32201
Of Counsel

November 1966

APPENDIX A

(Reprinted from *Atlantic Coast Line News;* September-October, 1966, pp. 2-3.)

Agreement Reached on Expanded Employee Merger Protective Provisions

Following offers made in September by the Coast Line and Seaboard in anticipation of merger of the two Companies, to provide broadened protective conditions for the benefit of their employes, an agreement was signed on November 3 by the two railroads and a majority of the labor organizations. Negotiations are underway with the remaining organizations for similar agreements.

The November 3 agreement gives greater coverage than was required by the Interstate Commerce Commission in its Order approving the merger, and assures continued employment for all present employes of the two railroads.

It provides, among other things, that the Merged Company will take into its employment all of those who were employes of the two railroads on August 1, 1966, and subsequent to that date up to and including the date the corporate merger is made effective. After the merger no employe of either of the carriers who performed compensated service between August 1, 1966, and the date of the merger, both dates inclusive, will be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges at any time during his employment.

The Merged Company will also take over and continue the existing employment relationships of all employes on furlough or leave-of-absence and preserve their rights and equities. Protection under the agreement will cease in the event of resignation, death, retirement, dismissal for cause in accordance with existing agreements, failure to work due to disability or discipline, or failure to exercise seniority rights in accordance with existing rules or agreements.

Employes who may be affected and their representatives are to be given at least 90 days' notice of changes contemplated because of the merger. Implementing agreements will be made to provide for transfer of work and employes, and for allocation or rearrangement of forces made necessary by those changes.

Existing working agreements will be continued in effect until they are merged into new agreements covering all employes of the Merged Company in each craft. Provision also has been made for necessary consolidation of seniority rosters and seniority districts for each class and craft of employes.

Any transferred employe required to change his place of residence is to be reimbursed for all expenses of moving his household and other personal effects. He will be reimbursed, also, for the traveling expenses of himself and members of his family, including living expenses for himself and his family and his actual wage loss during the time necessary for the transfer, and for a reasonable time afterwards (not to exceed 5 working days), used in securing a place of residence at his new location. Additionally, each transferred employe will receive a transfer allowance of $400.00.

If the employe owns his home in the locality from which he is required to move, he will, at his option, be reimbursed for any loss suffered in the sale of his home for less than its fair value. If a transferred employe is leasing his home, he will be protected against any losses incident to the cancellation of his lease.

Any employe required to transfer who has 15 or more years' service may elect to resign rather than make the transfer; in the event of resignation, he will receive a lump sum separation allowance in the amount of 12 months' pay.

Should the Merged Company determine that it has an excessive number of employes, protected employes 60 years

of age or over may, at the option of the Company, be offered in seniority order the opportunity to resign and and accept a retirement allowance based upon the age of the employe as of his nearest birthday on the date the allowance is offered. The amount of the allowance to any employe who elects to resign under the conditions will range from 4 to 12 months' pay, dependent upon his age.

In the event any dispute or controversy arises over any part of the November 3 agreement or of any implementing agreements, provision has been made for rapid arbitration to settle the controversy.

This explanation of the agreement does not include all details but is intended only to furnish its highlights as information. Copies of the agreement will be printed and made available to employes concerned.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

FLORIDA EAST COAST RAILWAY CO. *v.* UNITED STATES ET AL.;

CITY OF TAMPA, FLORIDA *v.* UNITED STATES ET AL.;

RAILWAY LABOR EXECUTIVES ASSOCIATION ET AL. *v.* UNITED STATES ET AL.; and

SOUTHERN RAILWAY SYSTEM *v.* UNITED STATES.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

Nos. 638, 639, 640, and 641. Decided April 10, 1967.

PER CURIAM.

The motions to affirm in Nos. 638, 639, and 641 are granted and the judgment is affirmed.

The motion to dismiss in No. 640 is granted and the appeal is dismissed as moot.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted in Nos. 638, 639, and 641.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.